

2006

OTTER CREEK RESERVOIR COMPANY, a Utah corporation; RICHFIELD IRRIGATION CANAL COMPANY, a Utah corporation; SEVIER VALLEY CANAL COMPANY, a Utah corporation; MONROE SOUTH BEND CANAL COMPANY, a Utah corporation; MONROE IRRIGATION COMPANY, a Utah corporation; ELSINORE CANAL COMPANY, a Utah corporation; ANNABELLA IRRIGATION COMPANY, a Utah corporation; BROOKLYN CANAL COMPANY, a Utah corporation; JOSEPH IRRIGATION COMPANY, a Utah corporation; VERMILLION IRRIGATION

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# COMPANY, a Utah corporation; and PIUTE RESERVOIR AND IRRIGATION COMPANY, a Utah corporation; v. New Escalante Irrigation Company : Brief of Appellant

Utah Court of Appeals

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Kay L. McIff; McIff Firm; Richard K. Chamberlain; Chamberlain Associates; Attorneys for Appellants/Plaintiffs.

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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Supreme Court No. 20060942

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OTTER CREEK RESERVOIR COMPANY, a Utah corporation; RICHFIELD IRRIGATION CANAL COMPANY, a Utah corporation; SEVIER VALLEY CANAL COMPANY, a Utah corporation; MONROE SOUTH BEND CANAL COMPANY, a Utah corporation; MONROE IRRIGATION COMPANY, a Utah corporation; ELSINORE CANAL COMPANY, a Utah corporation; ANNABELLA IRRIGATION COMPANY, a Utah corporation; BROOKLYN CANAL COMPANY, a Utah corporation; JOSEPH IRRIGATION COMPANY, a Utah corporation; VERMILLION IRRIGATION COMPANY, a Utah corporation; and PIUTE RESERVOIR AND IRRIGATION COMPANY, a Utah corporation;

**Appellants/Plaintiffs,**

**vs.**

NEW ESCALANTE IRRIGATION COMPANY, a Utah corporation;

**Appellee/Defendant.**

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## ADDENDA TO APPELLANTS' BRIEF ON APPEAL

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Appellants/Plaintiffs appeal from an interlocutory order of the Sixth Judicial District Court, the

Honorable David L. Mower, Piute County, Civil No. 01060014

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UTAH APPELLATE COURTS

APR 19 2007

# IN THE SUPREME COURT OF THE STATE OF UTAH

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Supreme Court No. 20060942

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OTTER CREEK RESERVOIR COMPANY, a Utah corporation; RICHFIELD IRRIGATION CANAL COMPANY, a Utah corporation; SEVIER VALLEY CANAL COMPANY, a Utah corporation; MONROE SOUTH BEND CANAL COMPANY, a Utah corporation; MONROE IRRIGATION COMPANY, a Utah corporation; ELSINORE CANAL COMPANY, a Utah corporation; ANNABELLA IRRIGATION COMPANY, a Utah corporation; BROOKLYN CANAL COMPANY, a Utah corporation; JOSEPH IRRIGATION COMPANY, a Utah corporation; VERMILLION IRRIGATION COMPANY, a Utah corporation; and PIUTE RESERVOIR AND IRRIGATION COMPANY, a Utah corporation;

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Dallin W. Jensen

*Editors*

Robert W. Swenson, *Assistant Editor*

#### *The Utah Law of Water Rights*, State Engineer of Utah

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Assisted by Dallin W. Jensen

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##### PREFACE

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THE  
COMPILED LAWS OF UTAH

THE DECLARATION OF INDEPENDENCE

AND

CONSTITUTION OF THE UNITED STATES

AND

STATUTES OF THE UNITED STATES LOCALLY  
APPLICABLE AND IMPORTANT.

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COMPILED AND PUBLISHED

BY AUTHORITY.

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VOL. II.

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SALT LAKE CITY:  
HERBERT PEMBROKE, BOOK, JOB AND LEGAL BLANK PRINTER, 72 EAST TEMPLE STREET.

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1888.

## COMPILERS' NOTE.

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THIS compilation has been prepared, and is now published, by virtue of an Act of the Legislative Assembly, which will be found in Volume II. It was so prepared during the late session, under our supervision as a joint committee of the two Houses; it was reported to and approved by them, and its publication authorized.

The First Part contains the Declaration of Independence, Constitution of the United States, the original Act for the Establishment of the Territorial Government, and other acts applicable specially to this Territory and to Territories generally, including Utah. It contains also other general statutes in force here, as well as throughout the Federal Jurisdiction, because they concern our local interests, and have to be often consulted by the courts and the public. The other parts comprise all the general or public statutes of the Territory.

The compilation published in 1876 has been acted upon as a complete collection of all the general laws in force at that time. Such parts of that compilation as have remained in force are included in the present compilation. Their places in the former compilation are indicated by retention of the bracket section numbers. The late legislation is inserted with the numbering of sections contained in the original acts.

The subdivisions of the codes and some other acts have been literally preserved under the original names, whether "Chapters", "Articles" or "Titles." This was made necessary by the references in certain provisions to others by these subdivisions.

The statutes have been grouped in parts by putting those together in each part which were cognate to the general subject stated in its title. Smaller groups have been made on the same plan in Chapters, and the sections numbered consecutively through both volumes.

This compilation was undertaken after the convening of the late session of the Legislative Assembly, and the obvious intention of the act being to have the work concluded before its adjournment, three gentlemen were employed by the committee to collect and arrange the statutes. This work was in part done by them jointly, other parts, for expedition, separately; but under our direction and continuous supervision.

We vouch for its thoroughness and accuracy as an official compilation, besides the matter in Part One, of all the general statutes of the Territory in force.

SAMUEL R. THURMAN,  
CHAS. C. RICHARDS,  
ENOS D. HOGE,  
LUTHER T. TUTTLE,  
JOHN R. CARLISLE,

Joint Legislative Committee.

SALT LAKE CITY, June 15, 1888.

RELATING TO PROPERTY.

CHAPTER II.

WATER RIGHTS.

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County select-  
men created  
water commis-  
sioners; their  
powers and  
duties  
Feb. 20, 1880.

§ 2775. s 1. The selectmen of the several counties of this Territory are hereby created ex-officio water commissioners for their respective counties, whose powers and duties shall be to make, or cause to be made and recorded, such observations, from time to time, as they may deem necessary, of the quantity and flow of water in the natural sources of supply, and to determine, as near as may be, the average flow thereof at any season of the year, and to receive, hear and determine all claims to the use of water, and on the receipt of satisfactory proof of any right to the use of water having vested, to issue to the person owning such right a certificate therefor for recording, and to generally oversee, in person, or by agents appointed by them, the distribution of water within their respective counties, from natural sources of supply, to all the corporations, or persons, having joint rights in and to any natural source of supply, and to fairly distribute, according to the nature and extent of recorded rights, and according to law, to each of said corporations, or persons, their several portions of such water; and in case of dispute between any of such persons, or corporations, as to the nature, or extent, of their rights to the use of water, or right of way, or damages therefor, of any one or more of

and neglect to hear and decide such person's claim of right to use of water for more than three months after such person may have presented, in writing, his claim, or claims, and evidence in support thereof, for adjudication. *Provided* This section shall not be construed to affect or impair the authority or jurisdiction of any court in the issuance of temporary injunction or restraining order in such cases, or to abridge the right of any person aggrieved by any such decision to maintain any lawful suit, or appeal, after such decision may have been made.

Right of  
appeal.

Vested rights.  
Feb. 20, 1880.

§ 2780. s 6. A right to the use of water for any useful purpose, such as for domestic purposes, irrigating lands, propelling machinery, washing and sluicing ores, and other like purposes, is hereby recognized and acknowledged to have vested and accrued, as a primary right, to the extent of, and reasonable necessity for such use thereof, under any of the following circumstances:

1. Whenever any person or persons shall have taken, diverted and used any of the unappropriated water of any natural stream, water course, lake, or spring, or other natural source of supply.

2. Whenever any person or persons shall have had the open, peaceable, uninterrupted and continuous use of water for a period of seven years.

Secondary  
rights.

§ 2781. s 7. A secondary right to the use of water for any of said purposes is hereby recognized and acknowledged to have vested and accrued (subject to the perfect and complete use of all primary rights) to the extent of and reasonable necessity for such use thereof, under any of the following circumstances:

1. Whenever the whole of the waters of any natural stream, watercourse, lake, spring, or other natural source of supply has been taken, diverted and used by prior appropriators for a part, or parts, of each year only; and other persons have subsequently appropriated any part, or the whole, of such water during any other part of such year, such person shall be deemed to have acquired a secondary right.

2. Whenever, at the time of an unusual increase of water exceeding seven years' average flow of such water, at the same season of each year, all the water of such average flow then being used by prior appropriators, and other per-



appropriate and use such increase of water, such persons shall be deemed to have acquired a secondary right.

§ 2782. s 8. A right to the use of water may be measured by fractional parts of the whole source of supply, or by such fractional parts, with a limitation as to periods of time when used, or intended to be used; or it may be measured by cubic inches, with a limitation as to periods of time when used, or intended to be used; or it may be measured by cubic feet, with a limitation specifying the depth, width and elevation of the water at point of measurement, and, if necessary, with a further limitation, as to periods of time when used, or intended to be used, and such right may be appurtenant to the land upon which such water is used, or it may be personal property, at the option of the rightful owner of such right, and a change of the place of use of water shall in no manner affect the validity of any person's right to use water, but no person shall change the place of use of water, to the damage of his co-owners in such right, without just compensation.

Rights to the use of water, how measured

Water rights may be personal property, or otherwise.

§ 2783. s 9. A continuous neglect to keep in repair any means of diverting, or conveying, water, or a continuous failure to use any right to water, for a period of seven years at any time after the passage of this act, shall be held to be abandonment and forfeiture of such right, and whenever hereafter a conveyance of any parcel of land is executed, and a right to the use of water has been continuously exercised from the time of its first appropriation, in irrigating such land, such right shall pass to the grantee of such conveyance; and in cases where such right has been exercised in irrigating different parcels of land at different times, such right shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject however, in all cases, to payment by the grantee of any such conveyance, of all amounts unpaid on any assessment then due upon any such right. *Provided*, That in any of the cases mentioned in this section, any such right to the use of water, or any part thereof, may be reserved by the grantor of any such conveyance, by making such reservation in express terms inserted in such conveyance.

Neglect to use water for seven years held to be an abandonment of the right.

Water rights may be conveyed with the land. Feb. 20, 1880.

§ 2784. s 10. All rights to the use of water, and means of diverting water, shall be exempt from taxation, except for

LAWS  
OF THE  
STATE OF UTAH,  
PASSED AT THE  
SECOND REGULAR SESSION  
OF THE  
LEGISLATURE OF THE STATE OF UTAH,  
HELD AT  
SALT LAKE CITY, THE STATE CAPITAL, IN JANUARY,  
FEBRUARY AND MARCH, 1897.

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PUBLISHED BY AUTHORITY

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1897.  
SALT LAKE CITY.  

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STAR PRINTING COMPANY.

## CHAPTER LI.

## ASSESSING RAILROAD LANDS.

AN ACT Authorizing County Assessors to Assess all Railroad Lands not used as a Roadbed or Right of Way.

*Be it enacted by the Legislature of the State of Utah:*

SECTION 1. All railroad lands in this State not actually used as a roadbed or right-of-way, or for depot, yard or other necessary railroad purposes, shall be assessed by the assessor of the county in which said lands are situated.

Railway lands  
to be assessed  
by county  
assessor

Sec. 2. This act shall take effect upon approval.  
Approved March 11th, 1897.

## CHAPTER LII.

## WATER RIGHTS AND IRRIGATION.

AN ACT in Relation to Water Rights and Irrigation, and Making Provisions Regulating the Same

*Be it enacted by the Legislature of the State of Utah:*

SECTION 1. The rights to the use of any of the unappropriated waters of the State may be acquired by appropriation.

Acquiring  
water rights.

Sec. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons or ceases to use the water for a period of seven years the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact.

Use or abandon-  
ment of  
water right.

thereof. may be reserved by the grantor in any such conveyance, by making such reservation in express terms inserted in such conveyance, or may be treated as personal property and separately conveyed.

Personal prop-  
erty.

Sec. 22. The standard unit of measurement for flowing water shall be the continuous flow of one cubic foot per second of time and shall be known as the second-foot.

Unit of meas-  
urement.

Sec. 23. The volume of water required to cover one acre to a depth of one foot shall be known as the acre-foot and is equivalent to forty-three thousand five hundred and sixty (43,560) cubic feet.

Acre-foot.

Sec. 24. Water used for beneficial purposes may also be apportioned among the legal users by fractional parts of the whole source of supply, or (by fractional parts) with a limitation as to periods of time when used.

Apportion-  
ment among  
users.

Sec. 25. Any person who shall take or use more water than he is entitled to or has been allotted to him by a proper officer, shall be deemed guilty of a misdemeanor and shall be liable in damages to any corporation, company or individual injured by such unlawful taking.

Unlawful tak-  
ing of water

Sec. 26. Whenever any corporation, company or individual has the right of way for canals or ditches it shall be unlawful for any person to place or maintain in place any obstruction by fence or otherwise along or across such canals or ditches without providing gates sufficient for the passage of the owners or agents of such canals or ditches. Any person violating the provisions of this section shall be guilty of a misdemeanor.

Unlawful to  
obstruct canal

Sec. 27. The repeal by the Revised Statutes of Section 2403 to 2427, both inclusive, of the Compiled Laws of Utah, 1888, shall not be construed to affect the existence of any district or company organized under the aforesaid sections; but any such company or district shall, notwithstanding such repeal continue in existence with all the rights privileges and limitations heretofore conferred or imposed upon it by law until disincorporated or dissolved according to law. In any case in which an irrigation company or district shall have a right of action against a delinquent member of such company or district for the non-payment of taxes voted according to law, the board of directors thereof may proceed to sell the interest of such members in

Repealing does  
not affect ex-  
isting corpora-  
tion

Sale of stock  
for delinquent  
taxes

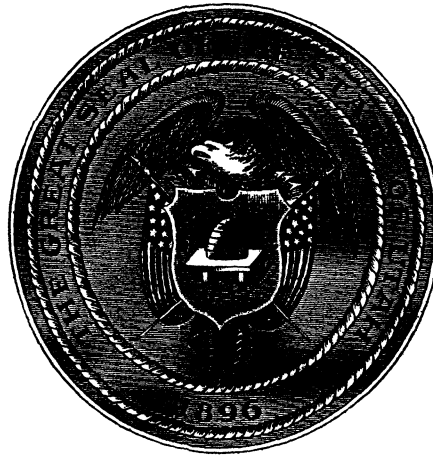
THE  
REVISED STATUTES

OF THE

STATE OF UTAH,

IN FORCE

JAN. 1, 1898.



Revised, Annotated, and Published by Authority of the Legislature,

BY

RICHARD W. YOUNG,

GRANT H. SMITH,

WILLIAM A. LEE,

*Code Commissioners*

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TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES, THE  
CONSTITUTION OF UTAH, THE ENABLING ACT, AND  
THE NATURALIZATION LAWS.

## PREFACE.

ON the admission of the state into the Union it was found necessary to provide for a general revision of the laws. Chapter eighty-five of the laws of eighteen hundred and ninety-six authorized the appointment by the governor of a commission to revise, codify, and annotate the laws of the state, and the undersigned were appointed for that purpose.

The duties prescribed were as follows: "Such commission shall carefully revise and codify all the laws of this state, and shall rewrite the same and divide them into appropriate parts and sections; insert all amendments, omit all parts repealed or obsolete or of a local or temporary character. Said commission shall have the power to transpose words and sentences, arrange the same into sections or paragraphs and number them, change the phraseology, and make any and all alterations and amendments necessary to improve, systematize, and harmonize the laws and make them conform to the constitution." The law also required that the commission should, on or before January first, eighteen hundred and ninety-seven, furnish to the governor for the use of the legislature, copies of the codification in the form of a bill or bills for enactment.

The laws of Utah had never been revised, and it was found necessary to rewrite them in great part, and to make many changes.

Of the changes made by the commission and adopted by the legislature, the more important are as follows: A new act on adoption; an act providing for assignments for the benefit of creditors; providing for the destruction of diseased animals; restrictions on the admission of attorneys, and providing for an attorney's lien; providing for the filing, renewal, and foreclosure of chattel mortgages, and for the mortgaging of exempt property with the consent of the wife; the repeal of all special municipal charters, and the enactment of a general law for the incorporation of cities and towns; amendment of the law providing for the formation of private corporations; restrictions on private and corporate banks; regulations concerning insurance companies; providing for a state bank examiner, and for the examination of building and loan associations, insurance companies, and loan, trust, and guaranty associations; providing for railroad rights of way, leases, rates, preferred stock, etc.; new descriptions of county boundaries; amendment of the county government bill; requiring cities and counties to publish itemized reports annually; providing that the district court hold three terms a year in each county; additional provisions concerning

courts; amendment of election law, including the substitution of office registration for house to house canvass; a new form of ballot; abolishing the numbering of ballots; prohibiting stay of execution of judgment in election contests; amendments in fee bills; providing for a state board of health, and prescribing the powers of local boards; additional provisions concerning highways; providing for the selection and recording of homesteads; giving to married women full contractual and property rights, and making them equally liable for the maintenance of the family; providing for a state engineer, for the measurement of water, and for the recording of water rights; the enlargement of jury lists, and providing for the selection of jurors by commissioners; granting greater powers to courts-martial; changes in the mining law, and abolishing the office of district mining recorder: amendment of school law, including provisions for the establishment of high schools outside of cities, and for the establishment of "parental schools"; providing for the employment of convicts; a general act on official bonds; changes in the law relating to real estate; amendment of the law of taxation, including a provision that the state board of equalization shall not assess railroads and other corporations doing business wholly within one county; providing for the registry of births and deaths; abolishing dower, and giving to a surviving wife one-third interest in fee of all realty of which her husband was seized during the coverture; changes in the law of succession; general provisions concerning state institutions providing for deputy state officers; changing the manner of commencing civil actions; providing for reply to counterclaim; other changes in pleadings; the addition of a chapter on garnishment; amendment of the law concerning trials, and a change in the manner of charging juries; modifications of the law concerning exceptions, new trials, and appeals; providing for the punishment of contempts before other than judicial officers; additional provisions concerning the foreclosure of mortgages; amendment of the law concerning forcible entry and detainer; amendment of the law of eminent domain; additional provisions on quo warranto; changes in procedure in justices' courts; simplification of probate procedure and important amendments thereto, including the provision that probate orders and decrees shall import absolute verity; providing forms of probate notices; prescribing a uniform length of time for publication; provisions concerning the selling, mortgaging, and leasing of property of decedent and other estates; providing for the determination of heirship; additions to the penal code; and numerous amendments to the code of criminal procedure.

In the preparation of this work the statutes of almost all of the states of the Union were consulted, and from them the commission received valuable assistance.

The commission entered upon its duties in April, eighteen hundred and ninety-six, and in January, eighteen hundred and ninety-seven, submitted its revision in the form of a printed bill ready for enactment. [The bill provided, and it was enacted, that it should take effect on January first, eighteen hundred and ninety-eight, that all laws enacted prior to the second regular session of the legislature, saving a few expressly enumerated, should be repealed, and that all other acts of

the legislature at its second regular session should have effect as subsequent statutes and as repealing any portion of the revision inconsistent therewith.

The bill was enacted substantially as prepared. The provisions concerning elections, schools, board of land commissioners, etc., were taken from the bill and passed as separate acts to take effect at an earlier date.

By chapter twenty-two of the laws of eighteen hundred and ninety-seven, the members of the commission were continued in office for the purpose of preparing for publication all laws of a general and permanent character passed at the second regular session of the legislature, such laws to be known as the Revised Statutes of Utah. In preparing the statutes for publication every effort has been made to add to their usefulness. Owing to the reduction in the number of sections and to the use of a larger page, the statutes are printed in one volume. The divisions have been simplified into titles, chapters, and sections. The substantive laws are arranged in alphabetical order, and are followed by the codes in the order in which they appeared in the compiled laws. The running head line at the top of each page indicates title and chapter heads. The reference immediately following each section indicates its origin as far as concerns the compiled laws of eighteen hundred and eighty-eight and acts amendatory thereof: the references to the compiled laws being "C. L.," followed by the section numbers; the references to the session laws being "'90," "'92," etc., followed by the page numbers. The asterisk is used to indicate that a change has been made in the section.

Where the origin is not given it will be understood that the section is a new one enacted by the legislature to take effect January first, eighteen hundred and ninety-eight. Where sections have been derived from other states or changed to conform to other kindred provisions, the name of the state and the number of the section of its laws consulted have been placed in the foot note; the asterisk denoting in such cases, as in others, that the section has not been precisely followed. The references to the California laws are made to the volumes of Deering's Annotated Codes. In many instances the foot notes contain references to other similar or related sections of the statutes and to closely connected provisions of the state constitution.

The constitution and the statutes have been annotated with all decisions rendered by the Utah supreme court prior to August first, eighteen hundred and ninety-seven, reference being made to the Utah reports and to the Pacific Reporter. The decisions of the United States supreme court in Utah cases are included. Decisions which do not construe particular sections have been placed under appropriate sections or under section twenty-four hundred and eighty-eight, which extends the common law over the state, reference to such decisions being made in the general index.

The constitution of the United States as herein printed is a literal copy furnished by the department of state at Washington, D. C. The constitutions and the enabling act are each followed by an index and the matter in them is not referred to in the general index.



The commission desires to make its acknowledgments to the judicial and other officers throughout the state, to members of the bar, and to citizens generally, for the many valuable suggestions received. The commission is greatly indebted to Mr. Beverly C. Mosby. Mr. Fred. E. Barker. Judge Morris L. Ritchie, Mr. Thomas D. Lewis, and Mr. Graham F. Putnam for assistance rendered. The completion of the task within the time limited was rendered possible by reason of the efficient aid rendered by these gentlemen.

RICHARD W. YOUNG,  
GRANT H. SMITH,  
WILLIAM A. LEE,  
*Code Commissioners.*

SALT LAKE CITY. UTAH, November 1, 1897.

prescription of a physician. Any person violating any of the provisions of this section shall be guilty of a misdemeanor. [C. L. § 2169\*; '90, p. 36\*.

1258. Physicians' prescriptions. If false. Any physician who shall issue to any person a prescription to obtain any intoxicating liquors at any time when the sale or disposal thereof shall have been forbidden by law, ordinance, or proclamation, shall certify on said prescription that the health of the person to whom the prescription is issued requires, and would be promoted by, the particular kind of liquor prescribed. Any physician who shall issue any prescription for intoxicating liquors contrary to this section, or believing the same to be false, shall be guilty of a misdemeanor. [C. L. § 2170\*; '90, p. 37\*; '94, p. 78.

1259. Proclamation forbidding sale on legal holiday. The mayor of any incorporated city in this state, and the president of the board of any incorporated town, are hereby authorized, whenever in their judgment the public good shall demand it, to forbid, by proclamation, the sale or disposition in any manner, within their respective cities or towns, of spirituous, vinous, or other intoxicating liquors, upon any day designated or set apart in this state as a legal holiday. ['94, p. 78.

1260. Id. Penalty. Any person, whether licensed or not, who shall sell, give away, or in any manner dispose of for gain, any spirituous, vinous, or intoxicating liquors, upon any day when such sale or disposition shall have been forbidden by proclamation, except for medical purposes upon a prescription issued by a regular practicing physician, shall be guilty of a misdemeanor. ['94, p. 78.

*This TITLE 33. Repealed 1903 Chap 100*

#### IRRIGATION AND WATER RIGHTS.

1261. Water right acquired by appropriation. The rights to the use of any of the unappropriated waters of the state may be acquired by appropriation. [C. L. § 2780\*; '97, p. 219.

The water of a prior appropriator is fixed by the extent of his appropriation for a beneficial use, and others may subsequently appropriate any water of the stream not so used by a prior appropriator, and such latter appropriation becomes a vested right, and is entitled to as much protection as the former, and the right to which he cannot be deprived of except by voluntary alienation or by abandoning it. The right of the former being thus fixed, he cannot enlarge his rights to the detriment of the latter. *Becker v. Marble Creek Irr. Co.*, — U. —; 4 P. 892. See also, *Munroe v. Ivie*, 2 U. 535. *Stowell v. Johnson*, 7 U. 215; 26 P. 290. *Salina Creek Irrigation Co. v. Salina Creek Stock Co.*, 7 U. 456; 27 P. 578. Sections 2339 and 2340 R. S. U. S. create no title as against the government in a person taking possession of public land for the purpose of procuring water or digging ditches for canals, without the performance of any work thereon. *Bear River Irr. Co. v. Garland*, 164 U. S. 1. Affirming 9 U. 350; 34 P. 368.

The discoverer of percolating waters on public lands, by digging a well for the purpose of collecting the same for use, acquires an easement in the land for the maintenance of his well, and a right to the water as an appropriator thereof from a "natural source of supply" (C. L. 1888, sec. 2780), as against a subsequent locator of the land on which the well is situated. *Sullivan v. Northern Spy Mining Co.*, 11 U. 438; 40 P. 709. The right of one who discovers and appropriates perco-

lating waters on public lands by digging a well to collect the water, is subject to the right of a subsequent locator of the land to sink a well adjoining such well, though it dry up the first. Id.

A decree adjudging that defendant should have "one good irrigation stream" is void for uncertainty. *Smith v. Phillips*, 6 U. 376; 23 P. 932. A decree allowing plaintiff enough "water to irrigate sixty acres of land" was affirmed; the court being of opinion that the amount could be approximated. *Holman v. Pleasant Grove*, 8 U. 78; 30 P. 72. But a finding that defendant was entitled to sufficient "water to irrigate thirty-one acres" and to "a small amount of water for culinary and domestic purposes," was ordered modified as uncertain, the court saying that the decree should state the amount of water in miner inches, or fractional parts of the stream in question. *Nephi Irr. Co. v. Vickers*, — U. —; 49 P. 301.

Where, by common consent, a city has for many years regulated the waters of a certain stream for irrigation purposes by distributing pro rata among the appropriators, in case of deficiency it cannot subsequently divide the appropriators into two classes according as their use began before or after a certain arbitrary date, and restrict only those of the second class; but all must be served alike. *Holman v. Pleasant Grove*, 8 U. 78; 30 P. 72. A municipal corporation took possession and control of the waters of a certain stream with the express consent of the original locators, and held the stream in

than seven years; *held*, that it acquired the ownership of the water under the statute of limitations. *Springville City v. Fulmer*, 7 U. 450; 27 P. 577.

Water in the pipes of a distributing system is personal property. Water flowing in a natural stream or ditch is not subject to ownership so far as the corpus of the water is concerned; the right to use it is a hereditament appurtenant to the land. *Bear River Irr. Co. v. Ogden City*, 8 U. 494; 33 P. 135. The owners of a water ditch are entitled to have the water flow therein in its natural state, and when they claim such water by prior appropriation, its corruption by any stranger is a private nuisance. *Crane v. Winsor*, 2 U. 248.

The doctrine of riparian rights is not in force in

Utah so as to prevent the owner of land from diverting the waters of a stream for purposes of irrigation and domestic use. *Stowell v. Johnson*, 7 U. 215; 26 P. 290. Where defendant transferred a dam, canal, and right of way to plaintiff's grantor, in consideration of the right to water two hundred acres of land from such canal; *held*, that defendant might take the water at as many different places as necessity required; and defendant was not required to contribute to keep the canal in repair in the absence of an express agreement to do so. *North Point Irr. Co. v. Little*, 14 U. 42; 46 P. 268. Water flowing in creeks or ditches cannot be regarded and treated as surface water. *Jordan v. City of Mt. Pleasant*, — U. —; 49 P. 746.

**1262. Id. Must be for useful purpose. Abandonment.** The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons or ceases to use the water for a period of seven years the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact. [C. L. §§ 2780\*, 2783\*; '97, p. 219.]

Person loses right to ditch and easement for same by non-user for many years. *Stalling v. Ferrin*, 7 U. 477; 27 P. 686. But owner of ditch is estopped

from denying right of another who enlarges ditch and procures land expecting to use same. *Lehi Irr. Co. v. Moyle*, 4 U. 327; 9 P. 867.

**1263. Changing use or place of diversion.** The person entitled to the use of water may change the place of diversion, and may extend the ditch, flume, pipe, or aqueduct, by which the diversion is made, to any place other than where the first use was made, and may use the water for other purposes than that for which it was originally appropriated, but no person shall change the place of use of water to the damage of his co-owners in such right without just compensation. ['97, p. 220.]

**1264. Turning into another stream or reservoir.** The water appropriated may be turned into the channel of another stream or reservoir constructed across the bed of any natural stream and mingled with its waters, and then be reclaimed; but, in reclaiming it, water already appropriated by another must not be diminished in quantity, or deteriorated in quality. ['97, p. 220.]

**1265. Equality among appropriators according to vested rights.** All persons, corporations, or associations that have appropriated any of the waters of the state for agricultural or other useful or beneficial purposes, or that may hereafter appropriate any of the waters of this state for agricultural or other useful or beneficial purposes, from any streams, springs, or lakes within the state, until all of the said waters are or shall have been diverted from the streams, springs, or lakes when at their average flow at low water mark, shall be deemed to be equal in rights to the said waters, according to their vested rights. ['97, p. 220.]

Existing water rights recognized and confirmed, Con. art. 17, sec. 1.

**1266. Secondary rights. How acquired.** A secondary right to the use of water for any useful or beneficial purpose may be appropriated subject to the perfect and complete use of all prior rights, to the extent of and reasonable necessity for such use thereof, in the manner hereinafter prescribed, under any of the following circumstances:

1. Whenever the whole of the waters of any natural stream, watercourse, lake, spring, or other natural source of supply has been taken, diverted, and used by prior appropriators for a part or parts, of each year only; and other persons shall subsequently appropriate any part, or the whole, of such water during any other part of such year, such persons shall be deemed to have acquired a secondary right.

2. Whenever, at the time of an unusual increase of water exceeding seven years' average flow of such water, at the same season of each year, all the water of such average flow then being used by prior appropriators, and other persons

of the whole source of supply, or by fractional parts with a limitation as to periods of time when used. ['97, p. 225.

**1285. Unlawful taking of water. Penalty.** Any person who shall take or use more water than he is entitled to or has been allotted to him by a proper officer, shall be deemed guilty of a misdemeanor, and shall be liable in damages to any corporation, company, or individual injured by such unlawful taking. ['97, p. 225.

**1286. Obstructing canal. Penalty.** Whenever any corporation, company, or individual has the right of way for canals or ditches it shall be unlawful for any person to place or maintain in place any obstruction by fence or otherwise along or across such canals or ditches without providing gates sufficient for the passage of the owners or agents of such canals or ditches. Any person violating the provisions of this section shall be guilty of a misdemeanor. ['97, p. 225.

**1287. Existing irrigation districts not affected by repeal.** The repeal by the Revised Statutes of sections twenty-four hundred and three to twenty-four hundred and twenty-seven, both inclusive, of the Compiled Laws of Utah, 1888, shall not be construed to affect the existence of any district or company organized under the aforesaid sections; but any such company or district shall notwithstanding such repeal, continue in existence with all the rights, privileges, and limitations heretofore conferred or imposed upon it by law until discontinued or dissolved according to law. In any case in which an irrigation company or district shall have a right of action against a delinquent member of such company or district for the non-payment of taxes voted according to law, the board of directors thereof may proceed to sell the interest of such members in the canals or ditches of such company or district and his right to the use of the water flowing therein. ['97, pp. 225-6.

**1288. Dissolution of existing irrigation districts.** Whenever a petition is presented to the board of trustees of any irrigation company or district organized under the sections mentioned in the next preceding section, signed by one-fourth of the landholders in the district, asking for the abandonment of further operations by the company or district, the board of trustees thereof shall call a special meeting at which the question of such abandonment shall be submitted. Notice of the time and place and subject of such meeting shall be given by the board of trustees of the district at least ten days previous thereto, by advertising at least three times in some newspaper having general circulation in the district or by posting notices in three public places therein. If three-fifths of the landholders of the districts voting at such election shall vote for such abandonment, it shall be the duty of the board of trustees to petition the district court of the county in which the greater portion of the lands of the district are situated for the winding up of the affairs of such company or district; and thereafter proceedings shall be had which shall conform as nearly as may be with the proceedings for the voluntary dissolution of corporations. ['97, p. 226.

Voluntary dissolution of corporations, §§ 3661-3667

## TITLE 34.

### JUDGMENT LIEN, U. S. COURTS.

**1289. Attaches, when.** The judgment of a district or circuit court of the United States rendered in this state, may be made a lien upon the real estate owned by the judgment debtor not exempt from execution, and also upon all such estate as he may acquire for the period of five years from the date of the

LAWS

OF THE

STATE OF UTAH,

PASSED AT THE

FIFTH REGULAR SESSION

OF THE

Legislature of the State of Utah.

HELD AT

SALT LAKE CITY, THE STATE CAPITAL, IN JANUARY,  
FEBRUARY AND MARCH, 1903.

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PUBLISHED BY AUTHORITY.

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Press and bindery of  
THE SKELTON PUBLISHING CO.,  
Provo, Utah.

clerk of the board of trustees, except the bond of the clerk, which shall be filed with the treasurer.

Sec. 2. This act shall take effect upon approval.

Approved this 12th day of March, 1903.

## CHAPTER 100.

### WATER RIGHTS AND IRRIGATION.

*Repealed 1905, Page 145*

AN ACT providing for determining and recording water rights; regulating the diversion, use and apportionment of water, prescribing the manner in which water may be appropriated; providing for the appointment of a State Engineer and prescribing his qualifications, powers, duties and compensation; requiring claimants to the use of water to file statements of their claims and declaring the forfeiture of rights for failure to file such statements, providing for the taking of testimony and the entering of decrees determining rights to the use of water, and permitting appeals; requiring certificates of water rights to be issued, filed and recorded; directing that the State shall be divided into water divisions and districts, and that superintendents and supervisors shall be appointed to apportion the water; requiring applications for the appropriation of water to be filed and permitting the construction of diverting works; providing for the issuance and recording of certificates of appropriation; declaring water to be public property, subject to existing rights; fixing units of measurement of water; establishing basis, measure and limit of right; providing for the abandonment of use, change in manner or place of use, and commingling and recovery of water; defining rights of appropriators, permitting irrigation companies to take stock in similar companies, providing for the acquisition of rights of way, and the use and enlargement of existing canals; directing that canals, bridges, and crossings be kept in repair, declaring when water rights are appurtenant to land, and how transfers are to be made and recorded, fixing penalties for violations of this act, providing legal advisers for State Engineer; establishing fees and prescribing how they shall be collected and paid to the State; providing for the payment of fees, costs and expenses under this act; prescribing who may be parties in actions concerning water; preserving the existence and providing for the dissolution of irrigation districts; repealing title 33 of the Revised Statutes of Utah of 1898, on "Irrigation and Water Rights," being sections 1261 to 1288, inclusive, and chapter 125 of the Laws of Utah of 1901, entitled, "an act defining the duties of the State Engineer, providing for the creation of water districts and for the appointment of a water commissioner for each district; providing for the reclamation of stored water, and repealing chapter 8 title, 63, Revised Statutes of Utah of 1898," approved March 25, 1901, and all other laws and parts of laws in conflict with the provisions of this act; but preserving vested rights to the use of water, and providing that any right initiated under the laws repealed may be completed and perfected; continuing the term of office of the State Engineer; providing that water commissioners heretofore appointed shall continue to perform their duties until superseded by division superintendents and district supervisors, and that similar water commissioners may be appointed, if necessary,

*Be it enacted by the Legislature of the State of Utah:*

**SECTION 1. Office of State Engineer.** There shall be a State Engineer, who shall be appointed by the Governor of the State and be confirmed by the Senate. He shall hold his office for the term of four years and until his successor shall have been appointed and qualified. He shall have general supervision of the waters of the State and of their measurement, apportionment and appropriation, and of all division superintendents and district supervisors. He shall have power to make and publish such rules and regulations as he may deem necessary from time to time, to fully carry out the provisions of this act and secure the equitable and fair apportionment of the water according to the respective rights of appropria-

Sec. 29. **Duties of supervisor.** The supervisor of each district shall apportion the water in the natural stream or streams of his district, among the several ditches taking water therefrom, according to their respective rights, under the direction of the superintendent of his division. He shall so apportion, regulate and control the use of the waters of all streams within his district as will prevent waste.

Sec. 30. **May have assistants.** Each supervisor shall have power, in cases of emergency, with the consent of the superintendent of his division, to employ suitable assistants to aid him in the discharge of his duties. The employment of all such assistants shall terminate when the emergency ceases to exist, or when directed by the superintendent of the division.

Sec. 31. **Right of appeal.** Any person who may deem himself injured or discriminated against by the enforcement of any rule or regulation, or by any act of a division superintendent or district supervisor, shall have the right to appeal from the same to the State Engineer, by filing with him a statement of the manner in which he is injured or discriminated against. The State Engineer shall, after due notice, hear whatever testimony may be produced by the petitioner, either orally or by affidavit, and he shall have power to suspend, amend or confirm the regulation or act as justice may require; *provided*, that nothing herein shall be construed to prevent the petitioner from appealing to the court.

Sec. 32. **Compensation** Each division superintendent shall receive from the State such compensation as shall be fixed by the State Engineer, and the same shall be determined with reference to the extent and character of the service performed by each.

Sec. 33. **To keep account of time.** Each district supervisor shall keep a true and just account of the time spent by him in performing his duties, stating the time spent in each county, respectively, into which his district may extend, and shall present a true copy thereof, verified by oath, to the board of county commissioners of the county in which the work may have been done. And the said board of county commissioners shall, upon approval thereof by the superintendent of the water division, allow him the sum of three dollars per day for each day he shall have been actively employed, to be paid by the county in which the work has been performed. He shall, in like manner, keep and report the time of all assistants employed in his district, which, when approved in the manner aforesaid, shall be paid by the board of county commissioners of the county in which the work was done, at the rate of two dollars per day.

Sec. 34. **Rights to unappropriated water.** Rights to the use of any of the unappropriated water in the State may be acquired by appropriation, in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful or beneficial purpose, and, as between appropriators, the one first in time shall be first in right.

**Sec. 35. Application to be made for rights.** Any person, corporation or association, to hereafter acquire the right to the use of any public water in the State of Utah, shall before commencing the construction, enlargement or extension of any ditch, canal or other distributing works, or performing similar work tending to acquire the said right or appropriation, make an application in writing to the State Engineer, which shall include a map, profile and drawings, as hereinafter provided. Such application shall be upon a blank to be furnished by the State Engineer, and shall set forth the name and post office address of the person, corporation or association making the application; the nature of the proposed use for which the appropriation is intended; the flow per second of water to be used, and the time during which it is to be used each year; the name of the stream or other source from which the water is to be diverted; the place on such stream or source where the water is to be diverted, and the nature of the diverting works; and the dimensions, grade, shape and nature of the proposed diverting channel; and such other facts as will clearly define the full purpose of the purposed appropriation. If the proposed use is for irrigation, the application shall show, in addition to the above required facts, the legal subdivisions of land proposed to be irrigated, with the total area thereof, and the character of the soil.

If the proposed use is for developing power, the application shall show, in addition to the above required facts, the number, size and kind of water wheels to be employed; the head under which each wheel is to be operated; the extent of the power to be produced, and the purposes for which and the places where it is to be used; also, the point where the water is to be returned to the natural stream or source.

If the proposed use is for mining, the application shall show, in addition to the above required facts, the name of the mine and the mining district in which it is situated; the nature of the material mined, and the place where the water is to be returned to the natural stream or source.

**Sec. 36. Duty of Engineer.** On receipt of said application, it shall be the duty of the State Engineer to make an endorsement thereon of the date of its receipt, and to make a record of such receipt in a book in his office kept for that purpose. It shall be his duty to examine said application and ascertain if it sets forth all the above required facts, and if not, he shall return the same for correction. The date of such return, with the reasons therefor, shall be endorsed on the application, and a record made thereof in the book kept for recording receipts of applications. Like entries shall be made of the date of the return of all corrected applications, and of the date of the refusal and return of rejected applications.

**Sec. 37. To publish notices.** If not corrected as required, no further proceedings shall be had on such application, but when filed in compliance with this act, the State Engineer shall at once, at the expense of the applicant, to be paid in advance, publish in some



## UTAH STATE PROPERTY.

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accompanied by such detailed drawings as will exhibit the character of the material to be used in construction; the several appliances to be used in diverting and regulating the water; the nature of bridges or other structures connected with the work, and such other matter as will enable a proper understanding of the work which is proposed to be done. All of which shall be certified as being correct by the engineer making the survey, and as being part of the application, with the number thereof, by the party making the same.

Sec. 45. **Certificate to issue.** Upon it being made to appear to the satisfaction of the State Engineer that any appropriation has been perfected in accordance with the application therefor, it shall be the duty of the State Engineer to issue a certificate, in duplicate, to the party making the same, setting forth the name and post office address of the person, corporation or association by whom the water is to be used; the flow per second of water to be used; the purpose for which the water is to be used; the time during which the water is to be used each year; the name of the stream or source from which the water is to be diverted; the place on the stream or source where the water is to be diverted; the priority number of the right; the date of the appropriation; and such other matter as will fully and completely define the right of said person, corporation or association to the use of the water. One copy of said certificate shall be filed in the office of the State Engineer, and the other copy shall be delivered to the appropriator, and shall, within thirty days, be recorded by him in the office of the county recorder of the county where the water is diverted from the natural stream or source. The certificate so issued and filed shall vest in the appropriator the right and title to the use of the water in the volume, for the purpose and during the time mentioned therein, and shall be evidence of such right.

Sec. 46. **Priority.** The priority number of such appropriation shall be determined by the date of filing the written application in the State Engineer's office.

Sec. 47. **Waters public property.** The water of all streams and other sources in this State, whether flowing above or underground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof.

Sec. 48. **Measurement of water.** The discharge of one cubic foot per second of time, which shall be known as a second foot, shall be the unit of measurement of flowing water, and the acre foot shall be the unit of measurement of quantity. The acre foot is equivalent to forty-three thousand five hundred and sixty cubic feet.

Sec. 49. **Beneficial use.** Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State.

Sec. 50. **When right ceases, reversion.** When the appropriator or his successor in interest abandons or ceases to use water for a period of seven years, the right ceases, and thereupon such water reverts to the public and may be again appropriated, as provided in this act; but questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact.

**LAWS**  
**OF**  
**THE STATE OF UTAH**

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**PASSED AT THE**  
**THIRTEENTH REGULAR SESSION**  
**OF**  
**THE LEGISLATURE**

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**UTAH STATE PROPERTY**

Convened at the Capitol in the City of Salt Lake,  
January 13th, 1919,  
and adjourned sine die on the 13th day  
of March, 1919

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**PUBLISHED BY AUTHORITY**

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**PRESS OF**  
**THE F. W. GARDINER CO.**  
**SALT LAKE**



exchanging, disposing or serving of liquors, and who thereafter violates any of the provisions of this title, shall be considered a persistent violator of this title as provided in this section.

Approved March 13, 1919.

Chapter 67  
211 P 957, 958  
213 P 182, 186

Chapter 67  
57 U 425, 428

Chapter 67  
195 P 188, 189

#### CHAPTER 67.

Senate Bill No. 113

Compiled Laws, 1917, p. 724.

(Passed March 13, 1919. Approved March 13, 1919 In effect March 13, 1919.)

#### WATER AND WATER RIGHTS.

An Act defining general provisions concerning water and water rights, the appropriation, administration, adjudication and use of water and water rights, and repealing Chapters 1, 2, 3, and 4, Title 55, of the Compiled Laws of Utah, 1917, and all laws of Utah in conflict herewith.

*Be it enacted by the Legislature of the State of Utah:*

Chapter 67  
§ 1  
239 P 486, 498

SECTION 1. Ownership of water. The water of all streams and other sources in this State, whether flowing above or under the ground, in known or defined channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof.

Sec. 2. Standard of measurement. The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as a second-foot; and the standard unit of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet.

Sec. 3. Rights to the use. Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State.

Sec. 4. Public use—rights of way—manner of exercise—acquisition. The use of water for beneficial purposes, as provided in this Act, is hereby declared to be a public use. Any person, corporation or association shall have a right of way across and upon public, private and corporate lands, or other right of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels or other means of securing, storing and conveying water for irrigation or for any necessary public use, or for

drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not unnecessarily to impair the practical use of any other right of way, highway or public or private road, nor unnecessarily to injure any public or private property. Such right may be acquired in the manner provided by law for the taking of private property for public use.

*Amend.*  
*1st form*

Sec. 5. Use of waterways already constructed—costs—time. When any person, corporation or association desires to convey water for irrigation or any other beneficial purpose, and there is a canal or ditch already constructed that can be used or enlarged to convey the required quantity of water, then such person, corporation or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to use or enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be used or enlarged, for the damage, caused by said use or enlargement, and by paying an equitable proportion of the maintenance of said canal jointly used or enlarged; provided, that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or any other time that may be agreed upon with the owner of said canal or ditch, and the additional water turned in shall bear its proportion of loss by evaporation and seepage.

Sec. 6. Nonuse—reappropriation. When an appropriator or his successor in interest abandons or ceases to use water for a period of five years, the right ceases, and thereupon such water reverts to the public, and may be again appropriated, as provided in this Act.

<sup>87</sup>  
211 P 960  
213 P 182-184

*H*  
*15*

Sec. 7. State Engineer—qualifications—appointment—term—powers and duties—water districts. There shall be a State Engineer, who shall be appointed by the Governor by and with the advice and consent of the Senate. He shall hold his office for the term of six years and until his successor shall have been appointed and qualified. He shall have general administrative supervision of the waters of the State and of their measurement, appropriation, apportionment and distribution. He shall have power to make and publish such rules and regulations as may be necessary from time to time fully to carry out the duties of his office and particularly to secure the equitable and fair apportionment and distribution of the water according to the respective rights of appropriators. The State Engineer may establish water districts and define the boundaries thereof, said districts to be so constituted as to secure the best protection to the claimants of water, and the most economical supervision on the part of the State. No person shall be appointed to the office of State Engineer who has

quent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice.

Sec. 17. Rights of subsequent purchasers. Every deed of water right within this State hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same water right, or any portion thereof, where his own deed shall be duly recorded.

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13 Sec. 18. Liability for interference. Any person, corporation or association who shall in any way unlawfully interfere with, injure, destroy or remove any dam, headgate, weir, or other appliance for the diversion, apportionment or measurement of water, or who shall interfere with any of the persons authorized by this Act to apportion water, while in the discharge of their duties, shall be guilty of a misdemeanor, and shall also be liable in damages to any person injured by such unlawful act.

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14 Sec. 19. Obstructions. Whenever any person, corporation or association has the right of way for any canal or other water course, it shall be unlawful for any person to place or maintain in place any obstruction, by fence or otherwise, along or across such canal or water course, without providing gates sufficient for the passage of the owner or owners of such canal or water course or their agents. Any person, corporation or association violating the provisions of this Section shall be guilty of a misdemeanor.

See  
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canal  
a 156 Sec. 20. Determination of rights. Upon a verified petition to the State Engineer, signed by five or more water users upon any stream or water source, requesting the determination of the relative rights of the various claimants to the waters of such streams or water source, it shall be the duty of the State Engineer, if upon investigation he finds the facts and conditions are such as to justify, to make a determination of said rights, fixing a time for making such examination and taking such testimony as will enable him to determine the rights of the various claimants, provided that if 25 or more or a majority of the water users on any stream if there be less than 25, so petition, then the State Engineer shall proceed as in this Section provided for.

Sec. 21. Action begun—contents. When the State Engineer has completed the survey of any river system or water source, he shall bring an action in the district court and shall file a written statement with the clerk of the district court, setting forth the fact of the completion of such survey, the names and postoffice addresses of all persons, corporations and associations using water from said river sys-

ing section, all the particulars relating to the appropriation of the water of said river system or water source to which he lays claim. The service of notice is complete when personal service is had, or, when it is not had, on the expiration of the thirtieth day after the first publication of such notice.

50 Sec. 24. Time for filing and contents of statement. Each person, corporation or association claiming a right to use any water of said river system or water source shall, within sixty days after the service of such notice mentioned in the preceding section, file in the office of the clerk of the district court, a statement in writing which shall be signed and verified by the oath of the claimant, and shall include as near as may be the following:

The name and postoffice address of the person, corporation or association making the claim; the nature of the use on which the claim of appropriation is based; the flow of water used in cubic feet per second and the time during which it has been used each year; the name of the stream or other source from which the water is diverted, the place on such stream or source where the water is diverted, and the nature of the diverting works; the date when the first work for diverting the water was begun, and the nature of such work; the date when the water was first used, the flow in cubic feet per second, and the time during which the water was used the first year; and the place and manner of present use; and such other facts as will clearly define the extent and nature of the appropriation claimed, or as may be required by the blank form, which shall be furnished by the State Engineer under the direction of the court.

51 Sec. 25. Irrigated land—area—location—soil—crops. If the water claimed to have been appropriated is used for irrigation, the statement shall show, in addition to the facts required by Section 24 hereof, as nearly as possible the area of land irrigated the first year and each subsequent year; the total area at present irrigated, and its location in each section, township and range wherein it is situated; the character and depth of the soil and the kind of crops raised and maximum and minimum acreage irrigated during total period of use.

52 Sec. 26. Water power—amount—purpose—place. If the water claimed to have been appropriated is used for developing power, the statement shall show in addition to the facts required by Section 24 hereof, the number, size and kind of water wheels employed; the head under which each wheel is operated; the amount of power produced, and the purposes for which and the places where it is used; and the point where the water is returned to the natural stream or source.

53 Sec. 27. Milling or mining—district—material. If the water claimed to have been appropriated is used for milling or mining, the statement

shall show, in addition to the facts required by Section 24 hereof, the name of the mill and its location, or the name of the mine and the mining district in which it is situated; the nature of the material milled or mined, and the place where the water is returned to the natural stream or source.

54 Sec. 28. Tabulation of facts—report—recommendation by engineer. Within thirty days after the expiration of the sixty days allowed for filing statements or claims, the State Engineer shall begin to tabulate the facts contained in the statements filed, and to investigate, wherever he shall deem necessary, the facts set forth in said statements, with reference to the surveys already made or by further surveys, and shall, as expeditiously as possible, make a report to the court with his recommendation of how all rights involved shall be determined.

5/5 Sec. 29. Effect of statement—failure to make operates as a bar—proviso as to actual notice. The filing of each statement by a claimant shall be considered notice to all persons, corporations and associations of the claim of the party making the same, and any person, corporation or association failing to make and deliver such statement of claim to the clerk of the court within the time prescribed by law shall be forever barred and estopped from subsequently asserting any rights and shall be held to have forfeited all rights to the use of said water theretofore claimed by him; provided, however, that any claimant upon whom no other service of said notice shall have been made than by publication in a newspaper may apply to the court for permission to file a statement of claim after the time therefor has expired, and the court may extend the time for filing said statement, not exceeding six months from the first publication of said notice; but, before said time is extended, the applicant shall give notice by publication in a newspaper having general circulation on said river system or near the water source, to all other persons, corporations or associations interested in the water of that river system or water source, and shall make it appear to the satisfaction of the court that during the pendency of the proceedings he had no actual notice thereof in time to appear and file a statement and make proof of his claim; and all parties interested may present affidavits as to the matter of his actual notice of the pendency of such proceedings.

6 Sec. 30. Statements in lieu of pleadings—investigators of facts—competent evidence. The statements filed by the claimants shall stand in the place of pleadings, and issue may be made thereon. Whenever requested so to do the State Engineer shall furnish the court with any information which he may possess, or copies of any of the records of his office which relate to the water of said river system or water source. The court may appoint referees, masters, engineers, soil

of the rights to the use of water from said river system or water source has not already been made, proceed, as in this Act provided, to make such a general determination. In any action for the determination of water rights the State of Utah shall be joined as a necessary party.

Sec. 39. Report in case of waste—action by Engineer—re-determination. Whenever any person or user of water from any river system or water source believes that there is a waste of water from said river system or water source, said person or user of water may report the matter to the State Engineer or may petition the district court for the investigation of such alleged waste; whereupon the State Engineer may make an investigation and report his findings to said court of such alleged waste or said court may order or make such an investigation, and if such investigation warrants may proceed to make a determination, if such has not yet been had, or a re-determination, in whole or in part, of the rights to the use of the water from said river system or water source.

Sec. 40. Bond on action for re-determination—liability of claimant. Wherever a general determination of water rights upon any river system or water source has been made by the district court, any claimant to the use of water from said river system or water source seeking a re-determination of water rights upon such river system or water source shall, before commencing any action for such re-determination or for the revision of any final judgment other than as provided in Section 21 hereof, furnish to the court in which said action is commenced and before the filing of any petition or complaint for such purpose, a good and sufficient bond, in a form and with sureties approved by the court, in a sum fixed by the court, and at least equal to twice the estimated costs which may arise in said action; and if final judgment after hearing, or after appeal, should appeal be taken, should be awarded against such claimant, then such claimant shall be liable for the payment in full of all costs arising in such action and for all damages to other parties to said action arising therefrom.

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483, 485, 488,  
489, 492,  
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Sec. 41. Acquisition of the right of use—purpose—order—more beneficial use. Rights to the use of the unappropriated public water in the State may be acquired by appropriation, in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in right; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the State would materially interfere with a more beneficial use of such water, then the application shall be dealt with as provided in Section 48 hereof.

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§ 42  
239 P 479, 482

195 § 42  
P 189

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27  
Sec. 42. Procedure to acquire right to use unappropriated water. Any person who is a citizen of the United States or who has filed his declaration to become such, as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, in order hereafter to acquire the right to the use of any unappropriated public water in the State of Utah, shall, before commencing the construction, enlargement or extension of any ditch, canal, or other distributing works, or performing similar work tending to acquire the said right or appropriation, make an application in writing to the State Engineer. Such application shall be upon a blank to be furnished by the State Engineer, and shall set forth the name and post-office address of the person, corporation or association making the application; the nature of the proposed use for which the appropriation is intended; the quantity of water in acre-feet or the flow of water in second-feet to be appropriated, and the time during which it is to be used each year; the name of the stream or other source from which the water is to be diverted; the place on such stream or source where the water is to be diverted, and the nature of the diverting works; the dimensions, grade, shape, and nature of the proposed diverting channel; and such other facts as will clearly define the full purpose of the proposed appropriation. If the proposed use is for irrigation, the application shall show the legal subdivisions of land proposed to be irrigated, with the total acreage thereof, and the character of the soil. If the proposed use is for developing power, the application shall show the number, size and kind of water wheels to be employed; the head under which each wheel is to be operated; the amount of the power to be produced, and the purposes for which and the places where it is to be used; also, the point where the water is to be returned to the natural stream or source. If the proposed use is for milling or mining, the application shall show the name of the mill and its location and of the mine and the mining district in which it is situated, the nature of the mineral mines, and the place where the water is to be returned to the natural stream or source. The place of diversion and place of return of the water shall be designated with reference to the United States land corners or mineral monuments, when either the point of diversion or the point of return shall be situated within six miles of the nearest United States land corner. The storage of water by means of a reservoir shall be regarded as a diversion and the points of diversion in such cases shall be deemed to include the point where the water is taken from the stream and the center of the impounding dam of the reservoir. The lands to be inundated by the reservoir shall be described as nearly as may be, and by government subdivisions if upon surveyed land, and the area of the surface thereof when the reservoir is filled shall be given.

the faithful discharge of the duties of his office, and for the delivery to his successor or other officer appointed by the Governor to receive the same, of all moneys, books and other property belonging to the State then in his hands or under his control, or with which he may be legally chargeable as such officer.

§ 62  
213 P 182-186

**Sec. 62. Water Commissioners and deputies—salary and expenses—suits on same.** Wherever in the judgment of the State Engineer, or the district court, it is necessary to appoint a water commissioner, or deputy commissioner for the distribution of water from any river system or water source, such commissioner or deputy commissioner shall be appointed by the State Engineer, after consultation with the water users and the salary and expenses of such commissioner or deputy commissioner or commissioners shall be borne pro rata by the users of water from such river system or water source, upon a schedule to be fixed by the State Engineer, and such pro rata share shall be paid by each water user to the State Engineer in advance on or before the 1st day of April each year, and upon failure so to do, the State Engineer may forbid the use of water by any such delinquent while such default continues, or may bring an action in the court for such unpaid expense and salary, and such court may issue an order to show cause upon any delinquent user or users why a judgment for said sum should not be entered. Any such commissioner or deputy commissioner may be removed by the State Engineer for cause. The users of water from any river system or water source may petition the district court for the removal of any such commissioner or deputy commissioner, and after notice and hearing the court may order the removal of such commissioner or deputy commissioner, and direct the State Engineer to appoint his successor.

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Amended  
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1 p 26

**Sec. 63. Bond of Commissioners.** Every water commissioner before entering on his duties shall give a bond to the State, for the faithful performance of his duties, in a penal sum to be fixed by the State Engineer.

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213 P 182, 184,  
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**Sec. 64. Duties of State Engineer—district waters—enforcement of orders and judgments—duties of State Attorneys.** The State Engineer and his duly authorized assistants shall carry into effect the judgments of the courts in relation to the division, distribution or use of water under the provisions of this Act. The State Engineer shall divide, or cause to be divided, the water within any district, created under the provisions of this Act, among the several appropriators entitled thereto in accordance with the right of each respectively, and shall regulate and control, or cause to be regulated and controlled, the use of such water by such closing or partial closing of the head-gates as will prevent the waste of water or its use in excess of the

volume to which the appropriator is lawfully entitled, and shall regulate, or cause to be regulated, the controlling works of reservoirs in accordance with the provisions of this Act. Whenever, in the pursuance of his duties, the State Engineer regulates or causes to be regulated any headgate or the controlling works of any reservoir, he may attach to such headgate or controlling works a written notice properly dated and signed, setting forth that such headgate or controlling works has been properly regulated, and is wholly under his control, and such notice shall be a legal notice as to the facts therein contained to all parties interested in the division and distribution of water of such ditch or reservoir. Upon the request of the State Engineer or any of his duly authorized assistants, it shall be the duty of the Attorney General, county or district attorney to appear and defend the State Engineer or such assistant who shall be made defendant in any case which may arise in the pursuance of the duties of such officers within the district of said attorney.

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57 U 425,  
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Sec. 65. Petitions for redress. Any person who may be aggrieved or injured by the action of the State Engineer may petition the district court for redress. Any person who may be aggrieved or dissatisfied by the action of any duly authorized assistant of the State Engineer or by the failure of such assistant to comply with the provisions of this Act, may report to the State Engineer, who shall immediately act in the matter and correct or cause to be corrected any wrongful act of such assistant if he shall find that any injury has been done.

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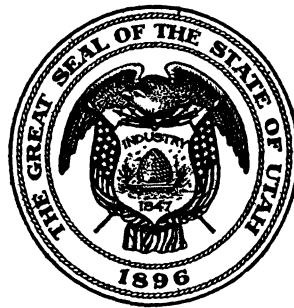
Sec. 66. Engineer to assist and co-operate with United States district court. The State Engineer, when requested by the district court of the United States in and for the State of Utah, may assist such court in any matter relating to the distribution and use of any of the waters of the State, and may, when so requested, co-operate with any Water Commissioner appointed by such court in any such matter.

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Sec. 67. Power to make complaints and arrests. The State Engineer, or any Water Commissioner, within his district shall have power to arrest any person or persons violating any of the provisions of this Act, and turn such person or persons over to the sheriff of the proper county, and immediately upon delivering any such person or persons so arrested into the custody of the sheriff, it shall be the duty of the State Engineer or Water Commissioner making such arrest to make complaint in writing and upon oath before the proper justice of the peace or to the district court against the person or persons so arrested.

Sec. 68. Regulations as to head gates, flumes, measuring devices—costs. Every person, corporation or association using water in this State shall

# **REVISED STATUTES OF UTAH 1933**



**Published June 17, 1933, by  
Authority of an Act of the Legislature  
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and the Naturalization Laws of the United States.

## TITLE 100

### WATER AND IRRIGATION

#### CHAPTER 1

#### GENERAL PROVISIONS

##### 100-1-1. Waters Declared Property of Public.

The water of all streams and other sources in this state, whether flowing above or under the ground in known or defined natural channels, is hereby declared to be the property of the public, subject to all existing rights to the use thereof.

(L. 19, p. 177, § 1.)

**Fish & Game**—Control by Commissioner, 30-0-6.  
**Nuisance**—Criminal—Polluting waters, 103-41.  
**Homesteads**—Water used on, exempt, 38-0-4.

**Purpose of Statute**—United States v. Caldwell, 231 P. 434, 64 U. 490.

**Chap. 67, Laws 1919**—Satisfies Due Process Clause. Eden Irr. Co. v. Dist. Court of Weber County, 211 P. 957, 61 U. 103. Subject and Title, sufficient. Eden Irr. Co. v. Dist. Court of Weber County, 211 P. 957, 61 U. 103.

Does not delegate judicial powers to State Engineer. Eden Irr. Co. v. Dist. Court of Weber County, 211 P. 957, 61 U. 103.

Does not interfere with vested rights. Eden Irr. Co. v. District Court of Weber County, 211 P. 957, 61 U. 103.

Provisions for relitigating adjudicated rights justified since water may not be wasted and conditions may change. Eden Irr. Co. v. Dist. Court of Weber County, 211 P. 957, 61 U. 103.

**Water Course**—Defined. Holman v. Christensen, 274 P. 457, 73 U. 389.

**Nature of Water Right**—Acquired only by appropriation, diversion and beneficial use. Bountiful City v. DeLuca, 292 P. 194, 77 U. 107.

An appropriator acquires no title in waters, but only the right to use. United States v. Caldwell, 231 P. 434, 64 U. 490. See also, Oldroyd v. McCrea, 235 P. 580, 65 U. 142; Garner v. Anderson, 248 P. 496, 67 U. 553.

**Corpus**—Under certain circumstances title to be acquired as personalty. Gunnison Irr. Co. v. Gunnison Hyland Canal Co., 174 P. 852, 52 U. 347.

Right is in and to particular waters of particular stream or source, and appropriator against his will cannot be made to accept an equal amount of water from another source. Richmond Irr. Co. v. Shaw, 181 P. 162, 54 U. 379. But see, United States v. Caldwell, 231 P. 434, 64 U. 490.

As appurtenant, lost by nonuser for 30 years, between claimants neither of whom has complied with the statute as to appropriation, the one prior in time of use has superior right. Mt. Olivet Cemetery Assn. v. Salt Lake City, 235 P. 876, 65 U. 193.

Limited to quantity necessary for use. Little Cottonwood Water Co. v. Kimball, 289 P. 116, 76 U. 243.

**Determination of, a judicial question.** Little Cottonwood Water Co. v. Kimball, 289 P. 116, 76 U. 243.

**Riparian Rights**—Common Law never adopted because inapplicable to our conditions. State v. Rolio, 262 P. 987, 71 U. 91.

Law of, does not obtain. Robinson v. Thomas, 286 P. 625, 75 U. 446; Bountiful City v. DeLuca, 292 P. 194, 77 U. 107; Hardy v. Beaver County Irr. Co., 234 P. 524, 65 U. 28.

##### 100-1-2. Unit of Measurement—Of Flow—Of Volume.

The standard unit of measurement of the flow of water shall be the discharge of one cubic foot per second of time, which shall be known as a second foot; and the standard unit of measurement of the volume of water shall be the acre foot, being the amount of water upon an acre covered one foot deep, equivalent to 43,560 cubic feet.

(L. 19, p. 177, § 2.)

**Measurement**—Standard is second or acre feet. Anderson v. Hamson, 167 P. 254, 50 U. 151.

##### 100-1-3. Beneficial Use Basis of Right to Use.

Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.

(L. 19, p. 177, § 3.)

**Beneficial Use**—Is basis of acquisition and extent of rights acquired is determined by. Gunnison Irr. Co. v. Gunnison Hyland Canal Co., 174 P. 852, 52 U. 347; Sowards v. Meagher, 108 P. 1112, 37 U. 212; Salt Lake City v. Gardner, 114 P. 147, 39 U. 30; Big Cottonwood Tanner Ditch Co. v. Shurtliff, 164 P. 856, 49 U. 569; Cleary v. Daniels, 167 P. 820, 50 U. 494; Oldroyd v. McCrea, 235 P. 580, 65 U. 142.

Is basis, measure and limit to right to use water. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 235 P. 876, 65 U. 193; Big Cottonwood Lower Canal Co. v. Cook, 274 P. 454, 73 U. 383.

##### 100-1-4. Reversion to Public—By Abandonment or Failure to Use.

When an appropriator or his successor in interest abandons or ceases to use water for a period of five years the right ceases, and thereupon such water reverts to the public, and may be again appropriated as provided in this title.

(L. 19, p. 177, § 6.)

**Abandonment**—Intent a controlling factor. Deseret Live Stock Co. v. Hoopipania, 239 P. 479, 66 U. 25, 31 A. L. R. 900. Distinguished from forfeiture for nonuse for statutory period. Deseret Live Stock Co. v. Hoopipania, 239 P. 479, 66 U. 25, 31 A. L. R. 900.

Mere failure to use for a time less than the statutory period is not necessarily an abandonment and owner may retake. Torsak v. Rukavina, 246 P. 367, 67 U. 166.

**Appropriation of abandoned waters**—Requisites. Torsak v. Rukavina, 246 P. 367, 67 U. 166.

By municipal corporation, by failure to use for thirty years. Mt. Olivet Cemetery Ass'n v. Salt Lake City, 235 P. 580, 65 U. 193.

**Loss and surrender**—By long continued and uninterrupted acquiescence in a use contrary to claimed right. Progress Co. v. Salt Lake City, 173 P. 705, 53 U. 556.

##### 100-1-5. Use of Water a Public Use.

The use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use.

(L. 19, p. 177, § 4.)

**Eminent Domain**—Exists to acquire right of way for ditch. Alcorn v. Reading, 243 P. 922, 66 U. 509. See also: Utah Copper Co. v. Montana-Bingham Consol. Mining Co., 255 P. 672, 69 U. 423.

**Requiring bond from plaintiff**—Quere: Has court right to exact—Form. Tanner v. Provo Bench Canal & Irrigation Co., 121 P. 584, 40 U. 105.

##### 100-1-6. Eminent Domain—For Ditches, Reservoirs, Etc.

Any person shall have a right of way across and upon public, private and corporate lands, or other rights of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels or other means of securing, storing and conveying water for domestic, culinary and irrigation purposes or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not unnecessarily to impair the practical use of any other right of

**100-2-11. Records — Certified Copies — Evidence.**

He shall keep on file in his office full and proper records of his work, including all field notes, computations and facts made or collected by him, all of which shall be part of the records of his office and the property of the state. All records, maps and papers recorded or filed in the office of the state engineer shall be open to the public during business hours. The office of the state engineer is hereby declared to be an office of public record, and none of the files, records or documents shall be removed therefrom, except in the custody of the state engineer or one of his deputies. Certified copies of any record or document shall be furnished by the state engineer on demand, upon payment of the reasonable cost of making the same, together with the legal fee for certification. Such copies shall be competent evidence, and shall have the same force and effect as the originals.

(L. 19, p. 177, § 71.)

**100-2-12. Seal.**

The state engineer shall have a seal which he shall affix to all certificates issued from his office, and he shall file a description and an impression of the same in the office of the secretary of state.

(L. 19, p. 177, § 72.)

**100-2-13. Attorney-General, District and County Attorneys to Counsel.**

In all matters requiring legal advice in the performance of his duties and the prosecution or defense of any action growing out of the performance of his duties, the attorney-general, and the district or county attorney of the county in which any legal question arises, shall be the legal advisers of the state engineer, and they are hereby required to perform any and all legal services required of them by him without other compensation than their salaries.

(L. 19, p. 177, § 76.)

**100-2-14. Fees.**

The state engineer shall collect the following fees, which shall be paid by him into the state treasury on the first Monday in January, April, July and October of each year:

For examining and approving plans and specifications for any dam, \$1 for each foot in height above stream bed of the dam to be built; and, if necessary to inspect the site where the dam is to be built, an additional charge of \$10 per day and expenses shall be made.

For inspecting any diverting works by request, \$10 per day and expenses.

For examining and filing applications to appropriate any quantity of water up to and including 10 second feet, for each such application, \$2.50, and additionally, \$1 for each second foot above 10.

For applications which contemplate the storage of water, a minimum fee of \$2.50 for each such application.

For applications for water that specify quantities greater than 500 acre feet, a fee of two cents for each acre foot of water to be stored in excess of 500 acre feet.

When the filing fee for any application for water shall exceed \$1,000, the balance of the fee in excess of \$1,000, may, at the option of the applicant, be paid at the time when proof of the completion of the works is submitted.

For examining maps, profiles and drawings that are part of the proof of appropriation, \$5.

For approving and recording a completed application, \$2.50.

For issuing certificate of appropriation, \$1.

For filing any other paper, \$1.

For copy of any paper, per folio, 20 cents.

For blueprint copy of any map, profile or drawing, per square foot, 10 cents.

For each certification, 50 cents.

The provisions of this section shall not apply to works prosecuted under the supervision of the United States. (L. 19, p. 177, § 77.)

**CHAPTER 3****APPROPRIATION****100-3-1. Only Manner of Acquiring Water Rights.**

Rights to the use of the unappropriated public waters in this state may be acquired by appropriation in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in right; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in section 100-3-8.

(L. 19, p. 177, § 41.)

**100-3-2. Application for—Contents.**

Any person who is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, in order hereafter to acquire the right to the use of any unappropriated public water in this state shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing works, or performing similar work tending to acquire such right or appropriation, make an application in writing to the state engineer. Such application shall be upon a blank to be furnished

**General Determination**—Under Act of 1919—Act reviewed and construed. *Huntsville Irrigation Association v. District Court of Weber County*, 270 P. 1090, 72 U. 431.

**Costs**, not provided for. *Bacon v. Harris*, 263 P. 930, 71 U. 223.

An action between water users to determine their respective rights as between themselves does not abate within the rule that the court first assuming jurisdiction retains it or prevent the maintenance of an action for general determination. *Smith v. Dist. Ct.*, 256 P. 539, 69 U. 493.

Under its powers to continue jurisdiction to prevent waste and meet changing conditions the court may on suggestion order a general determination and bring in all parties, although some parties have no desire for a general determination or are content with the rights accorded them in other litigation or to let their rights be determined in another action pending. Rules and practice and procedure governing ordinary law suits not applicable. *Mammoth Canal & Irr. Co. v. Burton*, 259 P. 408, 70 U. 239.

## CHAPTER 5

### ADMINISTRATION AND DISTRIBUTION

#### 100-5-1. Water Commissioners—Appointment—Term—Salary and Expenses—Removal.

Whenever in the judgment of the state engineer, or the district court, it is necessary to appoint a water commissioner for the distribution of water from any river system or water source, such commissioner shall be appointed annually by the state engineer, after consultation with the water users. The form of such consultation and notice to be given shall be determined by the state engineer as shall best suit local conditions, full expression of majority opinion being, however, provided for. If a majority of the water users, as a result of such consultation, shall agree upon some competent person to be appointed as water commissioner, the duties he shall perform and the compensation he shall receive, and shall make recommendations to the state engineer as to such matters or either of them, the state engineer shall act in accordance with their recommendations; but if a majority of water users do not agree as to such matters, then the state engineer shall make a determination for them. The salary and expenses of such commissioner shall be borne pro rata by the users of water from such river system or water source, upon a schedule to be fixed by the state engineer, based on the established rights of each water user, and such pro rata share shall be paid by each water user to the state engineer in advance on or before the 1st day of May each year, and upon failure so to do the state engineer may forbid the use of water by any such delinquent while such default continues, and may bring an action in the district court for such unpaid expense and salary, or the district court having jurisdiction of his person may issue an order to show cause upon any delinquent user why a judgment for such sum should not be entered. Any such commissioner

may be removed by the state engineer for cause. The users of water from any river system or water source may petition the district court for the removal of any such commissioner, and after notice and hearing the court may order the removal of such commissioner and direct the state engineer to appoint his successor.

(L. 31, p. 22, § 62.)

**Power of Arrest in Commissioners**, 100-2-9.

**Interference with diversion works**, 100-1-15; 103-59-1.

**Commissioner**—Appointed by engineer only after a consultation with water users. *Caldwell v. Erickson*, 213 P. 182, 61 U. 265.

**Distribution as to quantity and class** must be made according to decree. *Caldwell v. Erickson*, 213 P. 182, 61 U. 265.

Appointed by Engineer supersedes commissioner appointed by court. No vested right is impaired because it is matter of procedure and remedy. *Caldwell v. Erickson*, 213 P. 182, 61 U. 265.

**Costs**—Engineer's method of computing held inequitable. *Bacon v. Gunnison Fayette Canal Co.*, 284 P. 1004, 75 U. 278.

#### 100-5-2. Id. Bond.

Every water commissioner before entering on his duties shall give a bond to the state for the faithful performance of his duties, in a penal sum to be fixed by the state engineer.

(L. 19, p. 177, § 63.)

#### 100-5-3. Control by Engineer of Diversion and Distribution under Judgments.

The state engineer and his duly authorized assistants shall carry into effect the judgments of the courts in relation to the division, distribution or use of water under the provisions of this title. The state engineer shall divide, or cause to be divided, the water within any district created under the provisions of this title among the several appropriators entitled thereto in accordance with the right of each respectively, and shall regulate and control, or cause to be regulated and controlled, the use of such water by such closing or partial closing of the head gates as will prevent the waste of water or its use in excess of the quantity to which any appropriator is lawfully entitled, and shall regulate, or cause to be regulated, the controlling works of reservoirs in accordance with the provisions of this title. Whenever in pursuance of his duties the state engineer regulates or causes to be regulated any head gate or the controlling works of any reservoir, he may attach to such head gate or controlling works a written notice, properly dated and signed, setting forth that such head gate or controlling works has been properly regulated and is wholly under his control, and such notice shall be a legal notice as to the facts therein contained to all parties interested in the division and distribution of the water of such ditch or reservoir.

(L. 19, p. 177, § 64.)

#### 100-5-4. Head Gates and Measuring Devices.

Every person using water in this state shall construct and maintain a substantial head gate and measuring device at each point where water is diverted or turned out, for the purpose of regu-

tree upon which any such marks have been made for such purpose, with intent to destroy such marks;—is guilty of a misdemeanor.

(C. L. 17, § 8392.)

U. S. Monuments, etc., 103-26-73.  
Injuring or destroying mining notices, etc., 55-1-11.

#### 103-57-5. Injury to or Destruction of Property.

Every person who maliciously injures or destroys any real or personal property not his own, in cases other than such as are specified in this code, is guilty of a misdemeanor.

(C. L. 17, § 8385.)

Ref. State v. Allen, 189 P. 84, 56 U. 37.

#### 103-57-6. Removing Relics and Injuring Hieroglyphics.

Any person who takes from, removes or carries off from any public land, or any land not his own, without permission of the owner thereof, any relics, consisting of baskets, jars, cups, urns, utensils, bones, bodies, mummies or any other relics known as cliff dwellers' relics, or the relics of any ancient race of people, or who destroys or effaces any hieroglyphics, is guilty of a misdemeanor.

(C. L. 17, § 8505.)

#### 103-57-7. Injuring Monuments, Works of Art, Ornamental Trees and Plants.

Every person, not the owner thereof, who willfully injures, disfigures or destroys any monument or work of art, or useful or ornamental improvement, within the limits of any town or city, or any shade tree or ornamental plant growing therein, whether situated upon private ground or on any street, sidewalk or public park or place, is guilty of a misdemeanor.

(C. L. 17, § 8406.)

Injuring or destroying U. S. and other monuments, 103-26-73,  
55-1-11.

#### 103-57-8. Injuring Collections in Museums, Etc.

Every person who maliciously cuts, tears, defaces, breaks or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus or other work of literature, art or mechanics, or object of curiosity, deposited in any public library, gallery, museum, collection, fair or exhibition, is guilty of a misdemeanor.

(C. L. 17, § 8407.)

### CHAPTER 58

#### VAGRANCY

##### 103-58-1. Defined.

(1) Every person (except an Indian) without visible means of support, who has the physi-

cal ability to work, and who does not seek employment, nor labor when employment is offered him; and,

(2) Every healthy beggar who solicits alms as a business; and,

(3) Every person who roams about from place to place without any lawful business; and,

(4) Every person known to be a pickpocket, thief, burglar, or confidence operator, either by his own confession or by his having been convicted of either of such offenses, and having no visible or lawful means of support, when found loitering around any railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop, or crowded thoroughfare, car or omnibus, or at any public gathering or assembly; and,

(5) Every idle or lewd or dissolute person, or associate of known thieves; and,

(6) Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; and,

(7) Every person who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or person entitled to the possession thereof; and,

(8) Every person who lives in and about houses of ill fame; and,

(9) Every person who acts as a runner or capper for attorneys in and about police courts or city prisons; and,

(10) Every common prostitute, and every woman who from the doorways on the streets or any other place solicits men for immoral purposes; and,

(11) Every common drunkard; and,

(12) Every drug addict;—is a vagrant, and is punishable by imprisonment in the county jail not exceeding six months and may be sentenced to hard labor in the discretion of the court.

(L. 21, p. 395, § 8446.)

### CHAPTER 59

#### WATERS

##### 103-59-1. Interfering With Control of Water Commissioner.

Every person who in any way interferes with or alters the flow of water in any stream, ditch or lateral while under the control or management of any water commissioner, is guilty of a misdemeanor.

(C. L. 17, § 8514.)

Administration and Distribution of Waters, 100-5.  
Interfering with water devices, 100-1-15.



**103-59-2. Taking Out Of Turn or Excess Amount—Injuring Means of Diversion and Conveyance.**

Every person who, in violation of any right of any other person, willfully turns or uses the water, or any part thereof, of any canal, ditch, pipe line or reservoir, except at a time when the use of such water has been duly distributed to such person, or willfully uses any greater quantity of such water than has been duly distributed to him, or in any way changes the flow of water when lawfully distributed for irrigation or other useful purposes, except when duly authorized to make such change, or willfully and maliciously breaks or injures any dam, canal, pipe line, watergate, ditch or other means of diverting or conveying water for irrigation or other useful purposes, is guilty of a misdemeanor.

(C. L. 17, § 8410.)

Larceny of water, 103-36-16.

**103-59-3. Obstructing Gates by Logs.**

Every person who rafts or floats logs, timber or wood down any river or stream and allows such logs, timber or wood to accumulate at or obstruct the watergates owned by any person or irrigation company taking or diverting the water of such river or stream for irrigation or manufacturing purposes, is guilty of a misdemeanor.

(C. L. 17, § 8411.)

**103-59-4. Injuring Dams, Flumes, Reservoirs, Etc.**

Every person who willfully and maliciously cuts, breaks, injures or destroys any bridge, dam, canal, flume, aqueduct, levee, embankment, reservoir or other structure erected to create hydraulic power, or to drain or reclaim any swamp and overflowed or marsh land, or to conduct water for mining, manufacturing, reclamation or agricultural purposes, or for the supply of the inhabitants of any city or town; or willfully or maliciously makes or causes to be made any aperture in any such dam, canal, flume, aqueduct, reservoir, embankment, levee or struc-

ture with intent to injure or destroy the same or draws up, cuts or injures any piles fixed in the ground and used for securing any lake or river bank or walls, or any dock, quay, jetty or lock, is punishable by fine not exceeding \$500 or by imprisonment in the state prison not exceeding two years, or by both such fine and imprisonment.

(C. L. 17, § 8394.)

Interfering with water faucet, etc., 103-46-4, 5.  
Interference with or larceny of water, 103-36-16.

## CHAPTER 60

### WRITINGS

**103-60-1. Mutilation and Destruction.**

Every person who maliciously mutilates, tears, defaces, obliterates or destroys any written instrument, the property of another, the false making of which would be forgery, is punishable by imprisonment in the state prison for not less than one year nor more than two years.

(C. L. 17, § 8400.)

**103-60-2. Reading and Publishing Contents of Letter.**

Every person who willfully and corruptly opens or reads, or causes to be read, any sealed letter not addressed to himself, without being authorized so to do either by the writer of such letter or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such letter, knowing the same to have been unlawfully opened, is guilty of a misdemeanor.

(C. L. 17, § 8401.)

Opening messages, 103-46-8, 11.

**103-60-3. Sending Threatening Letter.**

Every person who knowingly and willfully sends or delivers to another any letter or writing, whether subscribed or not, threatening to accuse him or another of a crime, or to expose or publish any of his failings or infirmities, is guilty of a misdemeanor.

(C. L. 17, § 8402.)

Extortion, 103-17.

Offense of sending letter deemed complete, when, 103-1-27

# LAWS

of the

## STATE OF UTAH

passed at the

### REGULAR SESSION

of the

### TWENTY-FIRST LEGISLATURE

Convened at the Capitol in the City of Salt Lake

January 14, 1935

and adjourned sine die on

March 14, 1935

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Published by authority

# WATER AND IRRIGATION

## CHAPTER 104

H. B. No. 182.

(Passed February 27, 1935. In effect March 8, 1935.)

### WATER AND IRRIGATION

**An Act Amending Section 100-1-4, Revised Statutes of Utah, 1933, Relating to the Reversion of Water to the Public by Abandonment or Failure to Use Within Five Years Unless the Time Is Extended by the State Engineer as Herein Provided.**

*Be it enacted by the Legislature of the State of Utah:*

#### Section 1. Section Amended.

That section 100-1-4, Revised Statutes of Utah, 1933, is hereby amended to read as follows:

#### 100-1-4. Reversion to Public—By Abandonment or Failure to Use Within 5 Years—Extending Time.

When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to such application the time within which such nonuse may continue to be extended by the state engineer as hereinafter provided. [The

filing of such application shall extend the time during which nonuse may continue until the order of the state engineer thereon. Such application shall be on a blank to be furnished by the state engineer and shall set forth such information as he may require, including but not limited to the following: The name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; evidence of the validity of the right claimed by reference to application number in state engineer's office; date of court decree and title of case; or the date when the water was first used; the place, time and nature of past use; the flow of water which has been used in second feet or the quantity stored in acre feet and the time the water was used each year; the extension of time applied for, together with a statement of the reason for the nonuse of such water. Similar applications

may be made from time to time, before the date of expiration of the extension next theretofore granted.

The state engineer shall collect the following fees, which shall be paid by him into the state treasury on the first Monday in January, April, July and October of each year:

For examining and filing applications for extensions of time in which to resume use of any quantity of water up to and including 10 second feet, for each such application \$5, and additionally, \$2 for each second foot above 10.

For applications for extension of time in which to resume use of any quantity of storage water up to and including 500 acre feet \$5, and additionally, two cents for each acre foot above 500.

Upon receipt of such application the state engineer shall cause to be published at applicant's expense, to be paid in advance, once each week for three successive weeks, in a newspaper of general circulation in the county in which the source of water supply is located, a notice of the application, which notice shall contain, among other matters, the following: the name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; the place, time and nature of past use; the flow of water which has been used in second feet or the quantity stored in acre feet; and the extension of time applied for.

Any person interested may at any time after the first publication of such notice and prior to the thirtieth day after completion of publication, file with the state engineer a verified written protest, together with a copy thereof, against the granting of such extension of time, stating the reasons therefor, which shall be duly considered by the state engineer, and after such further investigation as the state engineer deems necessary, he shall allow or reject the application. The cost of any such investigation made by the state engineer shall be paid in advance by applicant; *provided*, that such charge shall not exceed \$10 per day and expenses to be paid the state engineer or his deputy and \$5 per day and expenses for each assistant.

Such application for extension shall be granted by the state engineer for a period not to exceed five years, upon a showing of reasonable cause for such nonuse. Financial crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future require-

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10-14

ments of the public, shall constitute reasonable cause for such nonuse.

Sixty days before the expiration of any such period of extension of time, the state engineer shall notify the applicant by registered mail of the date when such period of extension will expire. Before such date of expiration such applicant shall file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and such further information as may be relevant and be required by the blank form which shall be furnished by the state engineer for said purpose, or such applicant shall make application for further extension of time in which to resume use of the water as provided in this section, otherwise such water right shall cease and thereupon the water shall revert to the public; *provided*, that nothing in this section shall apply to underground or subterranean waters.

#### Section 2. Effective Date.

This act shall take effect upon approval.

Approved March 8, 1935.

### CHAPTER 105

S. B. No. 142.

(Passed March 13, 1935. In effect March 22, 1935.)

#### WATER AND IRRIGATION

**An Act Amending Section 100-1-1, Revised Statutes of Utah, 1933, Declaring Waters Property of Public; Amending Sections 100-1-6, 100-1-15, 100-2-14, 100-3-1, 100-3-2, 100-3-6, 100-3-7, 100-4-2, 100-4-3, 100-4-5, 100-5-1, 100-5-3, 100-5-4, and 100-5-10, Revised Statutes of Utah, 1933, Relating to General Provisions Concerning Water and Water Rights; the Powers and Duties of the State Engineer with Reference Thereto; and the Appropriation, Determination, Administration and Distribution Thereof; Amending Chapter 3, Title 100, Revised Statutes of Utah, 1933, by Adding Thereto a New Section to Be Known as Section 100-3-22, Revised Statutes of Utah, 1933, Providing for Reports of Well and Tunnel Drillers in Connection With Appropriation of Underground Waters, and Prescribing Penalty for Failure to Make Such Reports; and by Adding a New Section to Be Known as Section 100-3-23, Revised Statutes of Utah, 1933, Providing for Replacement of Underground Water; and Amending Chapter 5, Title 100, Revised Statutes of Utah, 1933, by Adding Thereto Two New Sections to Be Known as Sections 100-5-11 and 100-5-12, Revised Statutes of Utah, 1933, Defining the**

**Powers of the State Engineer With Reference to Waste, Loss, Pollution or Contamination of Waters and Prescribing Penalties for Failure to Comply With the State Engineer's Requirements; Providing for Notice of Claim to Underground Waters; Also Providing for the Payment of the Expenses of the Administration of This Act; and Repealing Section 100-5-8, Chapter 6 of Title 19, Chapter 5 of Title 86, and Chapter 7 of Title 100, Revised Statutes of Utah, 1933.**

*Be it enacted by the Legislature of the State of Utah:*

#### Section 1. Sections Amended.

Sections 100-1-1, 100-1-6, 100-1-15, 100-2-14, 100-3-1, 100-3-2, 100-3-6, 100-3-7, 100-4-2, 100-4-3, 100-4-5, 100-5-1, 100-5-3, 100-5-4 and 100-5-10, Revised Statutes of Utah, 1933, are hereby amended to read as follows:

##### 100-1-1. Waters Declared Property of Public.

All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof.

##### 100-1-6. Eminent Domain—For Ditches, Reservoirs, Etc.

Any person shall have a right of way across and upon public, private and corporate lands, or other rights of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, pipe lines and areas for setting up pumps and pumping machinery or other means of securing, storing, replacing and conveying water for domestic, culinary, industrial and irrigation purposes or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not unnecessarily to impair the practical use of any other right of way, highway or public or private road, or to injure any public or private property.

##### 100-1-15. Interfering With Water Works or Apportioning Official—Penalty and Liability.

Any person, who in any way unlawfully interferes with, injures, destroys or removes any dam, head gate, weir, casing, valve, cap or other appliance for the diversion, apportionment, measurement or regulation of water, or who interferes with any person authorized to apportion water while in the discharge of his duties, is guilty of a misdemeanor, and is also liable in damages to any person injured by such unlawful act.

*A1939*  
*P149* 100-2-14. Fees of State Engineer—Exception.

The state engineer shall collect the following fees, which shall be paid by him monthly into the state treasury, to the credit of the general fund.

For examining and approving plans and specifications for any dam, \$1 for each foot in height above the stream bed of the dam to be built; and, if necessary to inspect the site where the dam is to be built, an additional charge of \$10 per day and expenses shall be made.

For inspecting any diverting works by request, \$10 per day and expenses.

For examining and filing applications to appropriate any quantity of water up to and including 10 second feet, for each such application, \$2.50, and additionally, \$1 for each second foot above 10.

For applications which contemplate the storage of water, a minimum fee of \$2.50 for each such application.

For applications for water that specify quantities greater than 500 acre feet, a fee of two cents for each acre foot of water to be stored in excess of 500 acre feet.

When the filing fee for any application for water shall exceed \$1,000, the balance of the fee in excess of \$1,000, may, at the option of the applicant, be paid at the time when proof of the completion of the works is submitted.

For examining maps, profiles and drawings that are part of the proof of appropriation, \$5.

For approving and recording a completed application, \$2.50.

For issuing certificate of appropriation, \$1.

For filing any other paper, \$1.

For copy of any paper, per folio, 20 cents.

For blueprint copy of any map, profile or drawing, per square foot, 10 cents.

For each certification, 50 cents.

For the filing and recording of each notice of claim to underground waters, \$2.50.

The provisions of this section shall not apply to works prosecuted under the supervision of the United States Bureau of Reclamation.

*A1939*  
*P148* 100-3-1. Only Manner of Acquiring Water Rights.

Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in right; *provided*, that when a use designated by an application to appropriate any of the unappropriated waters

of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in section 100-3-8.

*A1735*  
*P148* 100-3-2. Id. Application for—Contents.

*A-1941*  
*P200*  
*A-1941*  
*P8255*  
Any person who is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, in order hereafter to acquire the right to the use of any unappropriated public water in this state shall, before commencing the construction, enlargement, extension or structural alteration of any ditch, canal, well, tunnel or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation, make an application in writing to the state engineer. Such application shall be upon a blank to be furnished by the state engineer, and shall set forth the name and postoffice address of the person, corporation or association making the application; the nature of the proposed use for which the appropriation is intended; the quantity of water in acre feet or the flow of water in second feet to be appropriated, and the time during which it is to be used each year; the name of the stream or other source from which the water is to be diverted; the place on such stream or source where the water is to be diverted and the nature of the diverting works; the dimensions, grade, shape and nature of the proposed diverting channel; and such other facts as will clearly define the full purpose of the proposed appropriation. If the proposed use is for irrigation, the application shall show the legal subdivisions of the land proposed to be irrigated, with the total acreage thereof and the character of the soil. If the proposed use is for developing power, the application shall show the number, size and kind of water wheels to be employed, and the head under which each wheel is to be operated; the amount of power to be produced and the purposes for which and the places where it is to be used; also, the point where the water is to be returned to the natural stream or source. If the proposed use is for milling or mining, the application shall show the name of the mill and its location or the name of the mine and the mining district in which it is situated, its nature, and the place where the water is to be returned to the natural stream or source. The place of diversion and place of return of the water shall be designated with reference to the United States survey corners or mineral monuments, when either the point of diversion or the point of return is situated within six miles of the nearest United States survey corner. The storage of water by means of a reservoir

1939  
SUPPLEMENT  
to the  
Utah Revised Statutes  
of 1933



CONTAINING ALL LAWS OF A GENERAL NATURE PASSED BY ALL  
REGULAR AND SPECIAL SESSIONS FROM 1933  
TO 1937, BOTH INCLUSIVE.

ANNOTATED WITH ALL THE UTAH DECISIONS FROM WHERE  
THE ANNOTATIONS LEFT OFF IN THE 1933 REVISION  
TO 82 PACIFIC SECOND



Compiled, Annotated, Edited and Indexed

BY

THE PUBLISHER'S EDITORIAL STAFF



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1939

## PREFACE



This supplement brings the laws contained in the 1933 Revision of the Statutes of Utah down to January 1, 1939, with all amendments, additions of new statutes, and repeals indicated.

In addition to these laws the law of Drainage Districts, which was omitted from the Revision of 1933, has been included, with all amendments and additions to date. This work entailed the examination of the Compiled Laws of 1917, which is the latest compilation of the subject prior to the present Revision, and all the session laws enacted since that time, namely the enactments of ten regular sessions of the legislature together with those of several special sessions.

While this work has entailed extended research, it is felt that the advantages thereby afforded attorneys of the State of Utah, in relieving them of this arduous labor and time involved, fully justified the effort. We take much satisfaction in thus presenting to the legal profession of the State of Utah this compilation, as it is not available in any other publication or compilation of the Statutes of Utah. In addition, the annotations include the decisions of the courts of Utah up to the time of going to press.

This compilation has been arranged, as far as possible, so as to coincide with the arrangement of the 1933 Revision, thus facilitating the use of this Revision, especially for lawyers already familiar with the scheme employed in the 1933 Revision.

The chapter and section numbering system of the 1933 Revision has been followed literally with respect to amendments, while unchanged sections retain their original numbers in the Revision of 1933, and with the same section catch lines. New laws have been inserted in places where germane to the laws in the Revision of 1933, using the numbers of the old sections and chapters, etc., with the addition of letters of the alphabet to distinguish them as new matter, except when added at the end of a chapter or title, in which case they are given new consecutive numbers.

The annotations are complete from those contained in the 1933 Revision to the date of going to press of this Revision—January, 1939.

As to the index, cross-references have been freely inserted so as to facilitate research by putting the user on the right track in case he has failed to select the logical topic in which to find the material for which he is searching. In this connection it should be constantly borne in mind that the cross-references are to TOPICS IN THIS INDEX, and not to titles appearing in the body of the statutes. The object of this arrangement is to avoid the necessity of looking in more than two places in ANY CASE.

Within the topics a strictly alphabetical arrangement has been followed, as well as in the arrangement of the topics themselves. There are no "blind" citations in this index. The

publishers fully realize the importance of a scientific and practical index to any statutory compilation, and have employed the services of compilers with many years of wide and varied experience in the work.

The table of contents in the front of the volume affords a comprehensive and concise view of the general arrangement of the statutes, and will be found helpful in many cases, especially to lawyers familiar with the 1933 Revision.

When the work of the 1939 Legislature has ended a table will be prepared showing every section in this Revision which has been affected by laws passed at that session. This table will be furnished free to all subscribers.

It has ever been the endeavor of the Courtright Publishing Company to furnish accurate and serviceable legal literature to the legal profession of the Rocky Mountain area, and they trust that this compilation will be received with the same favor as have others of their publications in the past.

Respectfully submitted,

HENRY C. ALLEN

Formerly of the Utah Bar

L. C. DARLINGTON

Formerly of the Corpus Juris Staff

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Of the Colorado Bar

Editors



# TITLE 100

## Water and Irrigation

### Chapter

1. General provisions. §§ 100-1-1 to 100-1-15.
2. State engineer, §§ 100-2-1a to 100-2-15.
3. Appropriation, §§ 100-3-1 to 100-3-26.
4. Determination of water rights, §§ 100-4-2 to 100-4-20.
5. Administration and distribution, §§ 100-5-1 to 100-5-13.
6. Water storage commission, § 100-6-2.
7. Logan river, § 100-7-1.
8. Withdrawal of unappropriated waters, § 100-8-1.
9. Reclamation projects—Determination of validity of contracts with United States, § 100-9-1.
10. Utah Lake diking project, §§ 100-10-1 to 100-10-4.
11. Metropolitan water districts, §§ 100-11-1 to 100-11-56.
12. Determination of validity of contracts of water users' associations, § 100-12-1.
13. Drainage and irrigation districts empowered to borrow money, §§ 100-13-1, 100-13-2.

### CHAPTER 1

#### GENERAL PROVISIONS

##### Section

1. Waters declared public property.
4. Reversion to public—By abandonment or failure to use within 5 years—Extending time.
6. Eminent domain—For ditches, reservoirs, etc.
14. Federal projects—Water rights appurtenant to land specified—Transfer to other lands.
15. Interfering with water works or apportioning official—Penalty and liability.

**100-1-1. Waters declared public property.** All waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all existing rights to the use thereof. [L. '35, Ch. 105, § 1, amending Rev. St. '33, § 100-1-1.]

1936. An appropriation of water flowing in a natural stream may be made, notwithstanding the point of diversion is on privately owned land, and condemnation required to secure right of way. *Whitmore v. Salt Lake City et al.*, 89 Ut. 387, 57 P. (2d) 726.

1935. The prior appropriator of percolating waters from an artesian well district is entitled to protection against acts of adjoining landowners in pumping water from wells on the adjoining land to such an extent as to reduce the flow or cause the prior appropriator's wells to cease flowing. *Wrathall v. Johnson*, 86 Ut. 50, 40 P. (2d) 755. *Justensen v. Olsen et al.*, 86 Ut. 158, 40 P. (2d) 802.

1935. Under the common law doctrine of riparian ownership and the doctrine of appropriation, one located nearer to the source was not permitted to cut off or interrupt or diminish or pollute the source. *Wrathall v. Johnson*, 86 Ut. 50, 40 P. (2d) 755.

### 100-1-3. Beneficial use basis of right to use.

1936. An appropriation of water flowing in a natural stream may be made, notwithstanding the point of diversion is on privately owned land, and condemnation required to secure right of way. *Whitmore v. Salt Lake City et al.*, 89 Ut. 387, 57 P. (2d) 726.

1934. Beneficial use is the basis, measure and limit of rights to the use of water, and a mere diversion of water for many years without making it appear that it was put to a beneficial use, or a showing of the area irrigated, and the duty of water on the land irrigated fails to establish any right. *Richfield Cottonwood Irr. Co. v. City of Richfield*, 84 Ut. 107, 34 P. (2d) 945.

**100-1-4. Reversion to public—By abandonment or failure to use within 5 years—Extending time.** When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to such application the time within which such nonuse may continue to be extended by the state engineer as hereinafter provided. The filing of such application shall extend the time during which nonuse may continue until the order of the state engineer thereon. Such application shall be on a blank to be furnished by the state engineer and shall set forth such information as he may require, including but not limited to the following: The name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; evidence of the validity of the right claimed by reference to application number in state engineer's office; date of court decree and title of case; or the date when the water was first used; the place, time and nature of past use; the flow of water which has been used in second feet or the quantity stored in acre feet and the time the water was used each year; the extension of time applied for, together with a statement of the reason for the nonuse of such water. Similar applications may be made from time to time, before the date of expiration of the extension next therefore granted.

The state engineer shall collect the following fees, which shall be paid by him into the state treasury on the first Monday in January, April, July and October of each year:

For examining and filing applications for extensions of time in which to resume use of any quantity of water up to and including 10 second feet, for each such application \$5, and additionally, \$2 for each second foot above 10.

For applications for extension of time in which to resume use of any quantity of storage water up to and including 500 acre feet \$5, and additionally, two cents for each acre foot above 500.

Upon receipt of such application the state engineer shall cause to be published at applicant's expense, to be paid in advance, once each week for three successive weeks, in a newspaper of general circulation in the county in which the source of water supply is located, a notice of the application, which notice shall contain among other matters, the following: the name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; the place, time and nature of past use; the flow of water which has been used in second feet or the quantity stored in acre feet; and the extension of time applied for.

Any person interested may at any time after the first publication of such notice and prior to the thirtieth day after completion of publication, file with the state engineer a verified written protest, together with a copy thereof, against the granting of such extension of time, stating the reasons therefor, which shall be duly considered by the state engineer, and after such further investigation as the state engineer deems necessary, he shall allow or reject the application. The cost of any such investigation made by the state engineer shall be paid in advance by applicant; provided, that such charge shall not exceed \$10 per day and expenses to be paid the state engineer or his deputy and \$5 per day and expenses for each assistant.

Such application for extension shall be granted by the state engineer for a period not to exceed five years, upon a showing of reasonable cause for such nonuse. Financial crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future requirements of the public, shall constitute reasonable cause for such nonuse.

Sixty days before the expiration of any such period of extension of time, the state engineer shall notify the applicant by registered mail of the date when such period of extension will expire.

Before such date of expiration such applicant shall file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and such further information as may be relevant and be required by the blank form which shall be furnished by the state engineer for said purpose, or such applicant shall make application for further extension of time in which to resume use of the water as provided in this section, otherwise such water right shall cease and thereupon the water shall revert to the public; provided, that nothing in this section shall apply to underground or subterranean waters. [L. '35, Ch. 104, § 1, amending Rev. St. '33, § 100-1-4.]

1937. The right to use water may be lost by abandonment and by ceasing to use it for the statutory period. Abandonment is not based on the time element, but intention, and non-users will not establish abandonment for any less time than the statutory period. *Hammond v. Johnson et al.*, 92 Ut. 211, 66 P. (2d) 894.

For opinion on denial of petition for rehearing see *Hammond v. Johnson et al.*, .... Ut. , 75 P. (2d) 164.

1932. In contempt proceedings for violation of a decree establishing priorities, by a party to it, the affidavit and decree serve as the complaint, and the pleader need not set forth the decree, as the court will take judicial notice of its records of prior proceedings in the case. The affidavit need not allege and no proof need be offered of any loss or injury to the affiant. *Utah Power & Light Co. v. Richmond Irr. Co. et al.*, and *Hyrum Irr. Co. v. Petersen et al.*, 80 Ut. 105, 13 P. (2d) 320.

1932. In proceedings for contempt in violating a decree adjudicating water rights, the court's findings justified a decree adjudicating the rights of respondent to exclusive use of water. *Utah Power & Light Co. v. Richmond Irr. Co. et al.*, 79 Ut. 602, 12 P. (2d) 357.

**100-1-6. Eminent domain—For ditches, reservoirs, etc.** Any person shall have a right of way across and upon public, private and corporate lands, or other rights of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, pipe lines and areas for setting up pumps and pumping machinery or other means of securing, storing, replacing and conveying water for domestic, culinary, industrial and irrigation purposes or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not unnecessarily to impair the practical use of any other right of way, highway or public or private road, or to injure any public or private property. [L. '35, Ch. 105, § 1, amending Rev. St. '33, § 100-1-6.]

1936. An appropriation of water flowing in a natural stream may be made, notwithstanding the point of diver-

### CHAPTER 3

#### APPROPRIATION

##### Section

1. Only manner of acquiring water rights.
2. Id. Application for—Contents.
3. Change of place of diversion or use—Application—Notice—Contest—Limitation of action.
6. Notice of application.
7. Protests.
12. Time for constructing works—Extensions.
13. Id. Protests—Hearings and notice.
14. Review by courts of engineer's decisions.
15. Id. Trial de novo—Equitable proceedings.
16. Proof of completion of works and application of water.
17. Certificate of appropriation—Evidence.
18. Reinstatement—Priority of appropriation—Transfer pending issuance of certificate—Constructive notice.
20. Right to convey appropriated waters in natural streams and impound in reservoirs.
22. Underground water—Report of well and tunnel drillers—Failure to comply—Penalty.
23. Id. Replacement of water.
24. Definitions.
25. Wells—Permits to dig required — Rules and regulations.
26. Id. Violations—Penalty.

**100-3-1. Only manner of acquiring water rights.** Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise.

The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in right; provided, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in section 100-3-8. [L. 735, Ch. 105, § 1, amending Rev. St. '33, § 100-3-1.

1937. One may obtain rights to the use of public waters by appropriation or may obtain private rights to the use of water by purchase, lease, or grant in recognition of the owner's title, or in derogation and defiance of the owner's title by disseisin of the owner and use and possession of the right for the statutory time, commonly called adverse possession. *Hammond v. Johnson et al.*, 92 Ut. 211, 66 P. (2d) 894.

For opinion on denial of petition for rehearing see *Hammond v. Johnson et al.*, .... Ut. ...., 75 P. (2d) 164.

1935. The prior appropriator of percolating waters from an artesian well district is entitled to protection against acts of adjoining landowners in pumping water from wells on the adjoining land to such an extent as to reduce the flow or cause the prior appropriator's wells to cease flowing. *Wrathall v. Johnson*, 86 Ut. 50, 40 P. (2d) 755. *Justensen v. Olsen et al.*, 86 Ut. 158, 40 P. (2d) 802.

1935. Under the common law doctrine of riparian ownership and the doctrine of appropriation, one located nearer to the source was not permitted to cut off or interrupt or diminish or pollute the source. *Wrathall v. Johnson*, 86 Ut. 50, 40 P. (2d) 755.

1934. A person claiming subterranean waters developed by him, has the burden of proving that he is not intercepting the tributaries or feeders of streams or sources of prior appropriators' supply, as those appropriating waters of natural springs or streams acquire a right in the subterranean waters feeding them, where the land through which the subterranean waters percolate was public domain at the time of the appropriation. A landowner intercepting percolating waters on his own land may use it thereon, but cannot convey it elsewhere if it interferes with the flow of springs or streams, the waters of which were appropriated when his lands were public domain. *Silver King Consol. Min. Co. v. Sutton et al.*, 85 Ut. 297, 39 P. (2d) 682.

1934. The ownership of seepage or percolating waters is vested in the owner of the soil through which they seep or percolate, when they are reduced to possession or control by the landowner, but if he permits them to leave his land by seeping, percolating or flowing therefrom, he loses all control over them. *Utah Copper Co. v. Stephen Hayes Est. et al.*, 83 Ut. 545, 31 P. (2d) 624.

##### **100-3-2. Id. Application for — Contents.**

Any person who is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, in order hereafter to acquire the right to the use of any unappropriated public water in this state shall, before commencing the construction, enlargement, extension or structural alteration of any ditch, canal, well, tunnel or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation, make an application in writing to the state engineer. Such application shall be upon a blank to be furnished by the state engineer, and shall set forth the name and postoffice address of the person, corporation or association making the application; the nature of the proposed use for which the appropriation is intended; the quantity of water in acre feet or the flow of water in second feet to be appropriated, and the time during which it is to be used each year; the name of the stream or other source from which the water is to be diverted; the place on such stream or source where the water is to be diverted and the nature of the diverting works; the dimensions, grade, shape and nature of the proposed diverting channel; and such other facts as will clearly define the full purpose of the proposed appropriation. If the proposed use is for irrigation, the application shall show the legal subdivisions of the land proposed to be irrigated, with the total acreage thereof and the character of the soil. If the proposed use is for developing power, the

# LAWS

of the

## STATE OF UTAH

Passed at the

### REGULAR SESSION

of the

### TWENTY-THIRD LEGISLATURE

Convened at the Capitol in the City of Salt Lake

January 9, 1939

and adjourned sine die on

March 9, 1939

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Published by authority

## WATER AND IRRIGATION

### CHAPTER 111

S. B. No. 234.

(Passed March 7, 1939. In effect March 20, 1939.)

#### WATER AND WATER RIGHTS— APPROPRIATION, ADMINISTRATION AND DISTRIBUTION

An Act Amending Sections 100-3-5, 100-3-8, Revised Statutes of Utah, 1933; Section 100-1-4, Revised Statutes of Utah, 1933, as Amended by Chapter 104, Laws of Utah, 1935; Section 100-3-1, 100-3-2, 100-3-6, Revised Statutes of Utah, 1933, as Amended by Chapter 105, Laws of Utah, 1935; Section 100-2-14, Revised Statutes of Utah, 1933, as Amended by Chapter 105, Laws of Utah, 1935, as Amended by Chapter 130, Laws of Utah, 1937, Sections 100-3-3, 100-3-12, 100-3-15, 100-3-18, 100-3-20, 100-8-1, Revised Statutes of Utah, 1933, as Amended by Chapter 130, Laws of Utah, 1937, and Section 100-5-13, Chapter 130, Laws of Utah, 1937, Relating to Water and Water Rights and the Powers and Duties of the State Engineer With Reference Thereto, the Appropriation, Administration, and Distribution Thereof, and Relating to Withdrawal of Unappropriated Waters; Amending Chapter 3, Title 100, Revised Statutes of Utah, 1933, by Enacting a New Section to Be Known as Section 100-3-27 Authorizing the Filing of Requests With the State Engineer for Segregation or Division of Pending Applications to Appropriate Water, or for a Permanent Change of Point of Diversion; Amending Chapter 5, Title 100, Revised Statutes of Utah, 1933, by Enacting a New Section to Be Known as Section 100-5-14, Requiring Owners of Reservoirs or Dams to Notify the State Engineer of the Approximate Location Thereof, the Dimensions of Dams, and the Capacity of Reservoirs; Providing for the Installation and Maintenance of Gauges in Reservoirs; and Authorizing the State Engineer to Bring an Action to Enforce Compliance With the Provisions of Such Section.

*Be it enacted by the Legislature of the State of Utah:*

#### Section 1. Sections Amended.

Sections 100-3-5, 100-3-8, Revised Statutes of Utah, 1933; Section 100-1-4, Revised Statutes of Utah, 1933, as amended by Chapter 104, Laws of Utah, 1935, Sections 100-3-1, 100-3-2, 100-3-6, Revised Statutes of Utah, 1933, as amended by Chapter 105, Laws of Utah, 1935; Section 100-2-14, Revised Statutes of Utah, 1933, as amended by Chapter 105,

Laws of Utah, 1935, as amended by Chapter 130, Laws of Utah, 1937; Sections 100-3-3, 100-3-12, 100-3-15, 100-3-18, 100-3-20, 100-8-1, Revised Statutes of Utah, 1933, as amended by Chapter 130, Laws of Utah, 1937, and Section 100-5-13, Chapter 130, Laws of Utah, 1937, are amended to read:

#### 100-3-5. Appropriation—Action by Engineer on Applications—Amended Applications.

On receipt of each application containing the information required by section 100-3-2, and payment of the filing fee, it shall be the duty of the state engineer to make an indorsement thereon of the date of its receipt, and to make a record of such receipt in a book kept in his office for that purpose. It shall be his duty to examine the application and determine whether any corrections, amendments, or changes are required for clarity and if so, the application shall be returned to the applicant within thirty days after its receipt with a statement of corrections, amendments or changes required, and sixty days shall be allowed for the filing thereof. If filed, corrected, amended or changed as required, within said time, the application shall, upon being accepted, take priority as of the date of its original receipt, subject to compliance with the further requirements of the law and the regulations thereunder. If not returned within said time it shall lapse and may be reinstated only upon compliance with the provision of section 100-3-18. The date of the return of the application shall be indorsed on the application, and a record made thereof in a book kept for recording applications. Like entries shall be made of the date when corrected applications are received by the state engineer. All applications which shall comply with the provisions of this chapter and with the regulations of the state engineer shall be filed and recorded in a suitable book kept for that purpose.

The state engineer may send the necessary notices and address all correspondence relating to each application to the owner thereof as shown by the state engineer's records, or to his attorney in fact or agent provided a written power of attorney is filed in the state engineer's office.

#### 100-3-8. *Id.* Approval or Rejection by Engineer—Costs of Inquiry.

It shall be the duty of the state engineer, upon the payment of the approval fee, to approve an application if; 1. There is unappropriated water in the proposed source; 2. The proposed use will not impair existing rights, or interfere with the more beneficial

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use of the water; 3. The proposed plan is physically and economically feasible unless the application is filed by the United States bureau of reclamation and would not prove detrimental to the public welfare; and 4. The applicant has the financial ability to complete the proposed works and the application was filed in good faith and not for purposes of speculation or monopoly; *provided*, that where the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary purposes, stock watering, power or mining development or manufacturing, or will prove detrimental to the public welfare, it shall be his duty to withhold his approval or rejection of the application until he shall have investigated the matter. The cost of such inquiry shall be paid by the person making the application, as provided by section 100-2-14, if such application is approved. If an application does not meet the requirements of this section, it shall be rejected.

**100-5-13. Time for Filing Notices of Claims Extended — Disposition of Fees Collected.**

The time for filing notices of claims to underground water as provided by section 100-5-12 is extended to March 22, 1940 and all notices of claims filed with the state engineer after March 22, 1938, but prior to the enactment hereof, shall have the same force and effect as if filed in time. All fees collected for filing and recording notices of claims to underground water after March 31, 1937, shall be paid into the state treasury as provided by section 100-2-14 and may be withdrawn therefrom upon warrants of the state engineer and used by him to defray the expense of locating the well or wells described in such notices with references to United States survey corners and to sea level datum.

**100-1-4. Reversion to Public by Abandonment or Failure to Use Within 5 Years—Extending Time.**

When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title, unless before the expiration of such five-year period the appropriator or his successor in interest shall have filed with the state engineer a verified application for an extension of time, not to exceed five years, within which to resume the use of such water and unless pursuant to such

application the time within which such nonuse may continue is extended by the state engineer as hereinafter provided. The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right. The filing of such application for extension of time shall

extend the time during which nonuse may continue until the order of the state engineer thereon. Such application shall be on a blank to be furnished by the state engineer and shall set forth such information as he may require, including but not limited to the following: The name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; evidence of the validity of the right claimed by reference to application number in the state engineer's office; date of court decree and title of case; or the date when the water was first used; the place, time and nature of past use; the flow of water which has been used in second feet or the quantity stored in acre feet and the time the water was used each year; the extension of time applied for, together with a statement of the reason for the nonuse of such water. Similar applications may be made from time to time, before the date of expiration of the extension next theretofore granted.

Upon receipt of such application the state engineer shall cause to be published at applicant's expense, to be paid in advance, once each week for three successive weeks, in a newspaper of general circulation in the county in which the source of water supply is located, a notice of the application, which notice shall contain, among other matters, the following: The name and address of applicant; the name of the source from which the right is claimed and the point on such source where the water was last diverted; the place, time and nature of past use; the flow of water which has been used in second feet or the quantity stored in acre feet; and the extension of time applied for.

Any person interested may at any time after the first publication of such notice and prior to the thirtieth day after completion of publication, file with the state engineer a verified written protest, together with a copy thereof, against the granting of such extension of time, stating the reasons therefor, which shall be duly considered by the state engineer, and after such further investigation as the state engineer deems necessary, he shall allow or reject the application.

Such applications for extension shall be granted by the state engineer for periods not exceeding five years each, upon a showing of reasonable cause for such nonuse. Financial

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crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts or other public agencies to meet the reasonable future requirements of the public, shall constitute reasonable cause for such nonuse.

Sixty days before the expiration of any such period of extension of time, the state engineer shall notify the applicant by registered mail of the date when such period of extension will expire.

Before such date of expiration such applicant shall file a verified statement with the state engineer setting forth the date on which use of the water was resumed, and such further information as may be relevant and be required by the blank form which shall be furnished by the state engineer for said purpose, or such applicant shall make application for further extension of time in which to resume use of the water as provided in this section, otherwise such water right shall cease and thereupon the water shall revert to the public, *provided*, that nothing in this section shall apply to underground or subterranean waters.

#### 100-3-1. Appropriation—Manner of Acquiring Water Rights.

Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner herein-after provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in rights; *provided*, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in section 100-3-8. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession.

#### 100-3-2. Appropriation—Contents of Application.

Any person who is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, or the state of Utah by the chairman of the water storage commission, the fish and game commissioner, the executive secretary of the state land board, or the chairman of the state road commission, for the use and benefit of the public, or the United States of America, in

order hereafter to acquire the right to the use of any unappropriated public water in this state shall, before commencing the construction, enlargement, extension or structural alteration of any ditch, canal, well, tunnel or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation, make an application in writing to the state engineer. Such application shall be upon a blank to be furnished by the state engineer, and shall set forth the name and post office address of the person, corporation or association making the application; the nature of the proposed use for which the appropriation is intended; the quantity of water in acre feet or the flow of water in second feet to be appropriated, and the time during which it is to be used each year; the name of the stream or other source from which the water is to be diverted; the place on such stream or source where the water is to be diverted and the nature of the diverting works; the dimensions, grade, shape and nature of the proposed diverting channel; and such other facts as will clearly define the full purpose of the proposed appropriation. If the proposed use is for irrigation, the application shall show the legal subdivisions of the land proposed to be irrigated, with the total acreage thereof and the character of the soil. If the proposed use is for developing power, the application shall show the number, size and kind of water wheels to be employed, and the head under which each wheel is to be operated; the amount of power to be produced and the purposes for which and the places where it is to be used; also, the point where the water is to be returned to the natural stream or source. If the proposed use is for milling or mining, the application shall show the name of the mill and its location or the name of the mine and the mining district in which it is situated, its nature, and the place where the water is to be returned to the natural stream or source. The place of diversion and place of return of the water shall be designated with reference to the United States survey corners or mineral monuments, when either the point of diversion or the point of return is situated within six miles of the nearest United States survey corner. The storage of water by means of a reservoir shall be regarded as a diversion, and the point of diversion in such cases shall be the point where the longitudinal axis of the dam crosses the center of the stream bed. The point where released storage water is taken from the stream shall be designated as the point of redirection. The lands to be inundated by any reservoir shall be described as nearly as may be, and by government subdivisions, if upon surveyed land, the height of the dam,

As  
adopted  
Laws of  
1935

added  
in 1939

## **ADDENDUM 6**

***Summary of Utah Real Property Law,***  
**1978, Volume II, Chapter IV, Water Law, § 14:32, page 628,**  
**J. Reuben Clark Law School**



## **ADDENDUM 6**

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***A Summary-Digest of State Water Laws***

**Richard L. Dewsnap**

**Dallin W. Jensen**

***Editors***

**Robert W. Swenson, *Assistant Editor***

***The Utah Law of Water Rights, State Engineer of Utah***

**Wells A. Hutchins**

**Assisted by Dallin W. Jensen**

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**Robert W. Swenson**

***Water Rights Laws in the Nineteen Western States, Vol. II & Vol. III***

**Wells A. Hutchins, JD**

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VOLUME II

BRIGHAM YOUNG UNIVERSITY LEGAL STUDIES

J. REUBEN CLARK LAW SCHOOL

1978

## CHAPTER XIV

### Water Law

#### A. WATER RIGHTS

##### 1. OWNERSHIP AND TITLE

###### a. [§ 14.1] In General<sup>1</sup>

By statutory amendment in 1935, "all waters in the state, both above and below the ground are property of the public subject to all existing rights in the use thereof."<sup>2</sup> This section has been interpreted to mean that water is available to members of the public upon compliance with the law and not that title to water is vested in the state.<sup>3</sup> This section places a duty upon the state to control the process of acquiring water rights in a manner that will be in the best interest of the public.<sup>4</sup>

###### b. [§ 14.2] Title to Water

Utah courts have long held that a person cannot acquire an absolute title to water.

No one owns or can own water in this state, regardless of whether that water is found in the form of a spring, stream, lake, pond, or under the ground. One can only acquire a right to use the water. One's right to use water is measured by the amount he puts to beneficial use without interfering with another person's prior right to use the water.<sup>5</sup>

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<sup>1</sup>An attempt to understand the complexity and subtle nature of Utah water law is best achieved with a background in the history and changes regarding water law from territorial days to the present. This chapter will not attempt to furnish such an historical perspective. The reader is directed to an excellent small treatise on the subject. W. A. Hutchings, *THE UTAH LAW OF WATER RIGHTS* (1965).

<sup>2</sup>UTAH CODE ANN. § 73-1-1 (1953).

<sup>3</sup>*Wrathall v. Johnson*, 86 Utah 50, 101, 40 P.2d 755 (1935).

<sup>4</sup>*Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943).

<sup>5</sup>*Melville v. Salt Lake County*, 570 P.2d 687,688 (Utah 1977).

used also affects the amount allowed to be appropriated. The state engineer must clearly determine the time, period, or season when the right to use water exists.<sup>31</sup>

**e. [§ 14.30] Priority Between Appropriators**

Sections 73-3-1 and 73-3-21 of the Utah Code provide that as between appropriators the first in time is the first in right. Priority of a claim to waters runs from the filing of the application with the state engineer, provided that all the requirements for an appropriation are met. Each appropriator is entitled to receive his whole supply before any subsequent appropriator has any right. However, in times of scarcity, domestic and agricultural uses take preference over all other uses.

**f. [§ 14.31] Doctrine of Relation Back**

The principle of relation back applies to the appropriation of water rights. The priority of an application is determined by the date the written application is received in the office of the state engineer. It is only a tentative priority, however, subject to compliance with the statutory requirements.

When an application to appropriate lapses for failure to comply with any of the statutory requirements or with any order of the state engineer, the original priority date also lapses. If the application is reinstated the date of priority is changed to the date of reinstatement.<sup>32</sup>

**2. [§ 14.32] PRESCRIPTIVE RIGHTS**

Prior to 1939 much confusion existed in Utah regarding the relationship between adverse use or adverse possession and the doctrines of abandonment and statutory forfeiture. As previously noted, the exclusive method today for acquiring water rights in Utah is by appropriation. The Utah Code now states that "no right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."<sup>33</sup> Therefore, any possible claims of a right arising by adverse use must have matured before the 1939 amendment to the Code. This requires the assertion of a hostile claim of title, with the knowledge and acquiescence of the owner, continuously for seven years before 1939.<sup>34</sup>

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<sup>31</sup>In *Re Escalante Valley Drainage Area*, 10 Utah 2d 77, 348 P.2d 679 (1960).

<sup>32</sup>UTAH CODE ANN. § 73-3-18 (1953); *See McGarry v. Thompson*, 114 Utah 442, 201 P.2d 288 (1948).

<sup>33</sup>UTAH CODE ANN. § 73-3-1 (1953).

<sup>34</sup>In *Re Drainage Area of Green River*, 12 Utah 2d 102, 363 P.2d 199 (1961); In *Re Drainage Area of Bear River*, 12 Utah 2d 1, 361 P.2d 407 (1961).

## D. LOSS OF WATER RIGHTS

### 1. ABANDONMENT

#### a. [§ 14.33] In General

An abandonment of water rights occurs when there is an intent to abandon coupled with some external act of relinquishment manifesting that intent. Mere non-use of the right will not constitute an abandonment.<sup>1</sup> The Utah Code limits the rule requiring some external act of relinquishment to cause an abandonment by providing that when a user abandons or ceases to use water for five years, the right ceases and the water reverts to the public domain.<sup>2</sup> Therefore, non-use of the right for the statutory period can be viewed as raising an irrebuttable presumption of an intent to abandon.<sup>3</sup> The inclusion of language in the Utah Code referring to both abandonment and non-use for five years (statutory forfeiture) has caused confusion between the two concepts. In *Hammond v. Johnson*,<sup>4</sup> the court distinguished between the two saying, that abandonment is not based on a time element. The controlling element is some manifestation of an intent to forsake or desert the right to use water.

Three years after *Hammond v. Johnson*, the same court incorrectly stated that abandonment "requires a concurrence of intention to abandon and actual failure in its use for the statutory period."<sup>5</sup> A clarification was made in 1961 which re-emphasized the correct principle that abandonment of a water right is a separate and distinct concept from mere non-use or forfeiture. Abandonment does not require non-use for any particular period of time; it may occur at any time when the water user manifests an intention to abandon the right.<sup>6</sup> It is, therefore, sufficient for the holder of a water right to simply use water or indicate an intent to use the water in the future in order to defeat an attempt to shown an abandonment.<sup>7</sup>

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<sup>1</sup>Promontory Ranch Co. v. Argile, 28 Utah 398, 79 P. 47 (1904).

<sup>2</sup>UTAH CODE ANN. § 73-1-4 (1953).

<sup>3</sup>Torsak v. Rukavina, 67 Utah 166, 246 P. 367 (1926).

<sup>4</sup>Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937).

<sup>5</sup>Tanner v. Provo Reservoir Co., 99 Utah 139, 152, 98 P.2d 695, 700 (1940).

<sup>6</sup>In Re Drainage Area of Bear River, 12 Utah 2d 1, 361 P.2d 407 (1961).

<sup>7</sup>In Re Escalante Valley Drainage Area, 12 Utah 2d 112, 363 P.2d 777 (1961).

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# **A Summary-Digest of State Water Laws**

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ever, in accomplishing this exchange, the water in the watercourse or reservoir must not be deteriorated in quality or diminished in quantity as a result of the exchange.<sup>96</sup>

### 3.4 *Loss of Rights*

The following rules and procedures govern loss of water rights in Utah, and they apply to all waters of the State, without regard to the source of supply.

#### A. STATUTORY FORFEITURE

A Utah statute provides that where an appropriator abandons or ceases to use his water for a period of 5 years, the right shall cease and revert to the public unless the owner applies to the State engineer for, and receives, an extension of time within which to resume use of the water. If a forfeiture occurs, the water reverts to the public.<sup>97</sup> Forfeiture is based upon failure to use the water and the intent of the water user is not a factor.<sup>98</sup> The Utah Supreme Court has held that a forfeiture will not occur if the appropriator is prevented from using the water by conditions of nature, such as drought conditions, or when the water otherwise simply is not available.<sup>99</sup>

#### B. ABANDONMENT

In order for an abandonment of a water right to occur, there must be an intent to abandon or forsake the right, coupled with a corresponding nonuse of the water.<sup>100</sup> Abandonment is distinguished from forfeiture in that the intent of the appropriator is important (in fact, essential) and no particular time element is involved (whereas it was noted that a statutory forfeiture cannot occur in less than 5 years and the intent of the water user is immaterial). The burden is upon the person claiming an abandonment to prove the elements which constitute abandonment.<sup>101</sup>

#### C. ADVERSE USE

Prior to 1939, the doctrine of adverse use was applicable to water rights in Utah. However, in 1939 the legislature enacted a statute which provided that no right to use water could thereafter be acquired by adverse use.<sup>102</sup> Consequently, in Utah today if an appropriator's water is used by another without his consent, no adverse use right will result but the right will be forfeited at the end of a 5-year period, and will revert to the public.

With respect to the acquisition of adverse use rights in the pre-1939 period, the Utah court announced that in order to gain such a right, there had to be a 7-year period (the period applicable to land titles) of continuous, uninterrupted, hostile, notorious, adverse en-

<sup>96</sup> Utah Code Ann., sec. 73-3-20.

<sup>97</sup> Utah Code Ann., sec. 73-1-4.

<sup>98</sup> *Kirk v. Criddle*, 12 U. 2d 112, 368 P. 2d 777 (1961).

<sup>99</sup> *Rocky Ford Irr. Co. v. Kents Lake Res. Co.*, 104 Utah 202, 135 P. 2d 108 (1943).

<sup>100</sup> *Promontory Ranch Co. v. Argile*, 28 Utah 398, 79 Pac. 47 (1904).

<sup>101</sup> *Dalton v. Wadley*, 11 U. 2d 84, 355 P. 2d 69 (1960).

<sup>102</sup> Utah Code Ann., sec. 73-3-1.

joyment of the water right.<sup>103</sup> The court has further said that there is a presumption against the acquisition of a right in this manner, and the burden is upon the party asserting a claim of adverse use to prove it.<sup>104</sup>

#### D. ESTOPPEL

The Utah court has held that an appropriator may lose his right to the use of water by inequitable conduct which leads others to make use of their water rights in a manner inconsistent with such right, but on the assumption that such use would be legal.<sup>105</sup>

#### E. MISCELLANEOUS

In addition to the statutes and doctrines discussed above which may cause loss of water rights, there are a number of questions with respect to the point at which an appropriator's right of use or control ends, or is lost; and, in a similar vein, questions arise as to whether an appropriator loses—or indeed whether he ever obtained—a right to use certain classes of water. Some of these problems are noted briefly below.

(1) *Saved or salvaged water*.—Salvaged waters are those which have always been a part of the system or source of supply, but have been lost to the established users as far as any application to a beneficial use is concerned, and which are recovered for use through the efforts of man. The Utah court has stated that the party whose efforts resulted in the salvage of water is entitled to its use, and the user whose water is being lost has no preferential right to salvage it.<sup>106</sup> The burden is upon the person claiming he has saved water to prove it, and also to show that he has done so without impairing prior rights.<sup>107</sup> At present, it appears that the right to use salvaged water can only be established by the filing of an application to appropriate the water which is to be salvaged.

(2) *Developed waters*.—Developed water is water which was not a part of the known system or source of supply prior to the work of the developer. The burden of proof is upon the developer to prove, at his own expense and by clear and convincing evidence, that he is not intercepting water which supplies other rights in the system.<sup>108</sup> The individual who, by his efforts, develops a flow of water in addition to existing rights is entitled to have an application approved to appropriate this developed water.<sup>109</sup>

(3) *Wastewater*.—A water user is entitled to use his waste and seepage waters as long as he has them in his possession and control. The Utah court has emphasized that this must be physical control and possession,<sup>110</sup> and once wastewater escapes the control of the original appropriator, he loses all right to it, and it is subject to reappropriation. But the original appropriator is not required to

<sup>103</sup> *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P. 2d 634 (1943).

<sup>104</sup> *In re Use of Water Within Drainage Area of Green River*, 12 U. 2d 102, 363 P. 2d 199 (1961).

<sup>105</sup> *Lehi Irr. Co. v. Moyle*, 4 Utah 327, 9 Pac. 867 (1886).

<sup>106</sup> *Big Cottonwood Ditch Co. v. Shurtliff*, 58 Utah 196, 189 Pac. 589 (1919).

<sup>107</sup> *Howcroft v. Union & Jordan Irr. Co.*, 25 Utah 311, 71 Pac. 487 (1903).

<sup>108</sup> *Bastian v. Nebeker*, 49 Utah 390, 163 Pac. 1092 (1916).

<sup>109</sup> *Bullhock v. Track*, 4 U. 2d 370, 294 P. 2d 707 (1956).

<sup>110</sup> *McNaughton v. Eaton*, 121 Utah 394, 242 P. 2d 570 (1952).



# **THE UTAH LAW OF WATER RIGHTS**

By

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**State Engineer of Utah  
In Cooperation With  
Natural Resource Economics Division  
Economic Research Service  
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## Loss of Water Rights

### Statutory forfeiture

It is provided by statute that on abandonment or cessation of use of water for a period of 5 years, the right shall cease and the water revert to the public subject to further appropriation, unless before expiration of the period the water right owner applies to the State Engineer for an extension of time for not exceeding 5 years, and unless the State Engineer grants it after a hearing. These provisions are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right. Applications may be granted for periods not exceeding 5 years each, upon a showing of reasonable cause for such nonuse of water. (§ 73-1-4.) Intent is not the governing factor in forfeiting one's appropriative right for nonuse.<sup>25</sup>

In construing forfeiture statutes of other States similar to this, said the Utah Supreme Court, it has been uniformly held that forfeiture will not operate where the failure to make use of the right results from physical causes beyond control of the appropriator, such as floods and droughts, where he is ready and willing to divert the water when it is naturally available.<sup>26</sup>

### Abandonment

"It is a well-settled principle of law that in order to constitute an abandonment there must be an intent to abandon, coupled with some external act of relinquishment by which the intent is carried out."<sup>27</sup> Evidence of mere temporary nonuser, without other evidence tending to show

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<sup>25</sup> *Kirk v. Criddle*, 12 Utah (2d) 112, 114, 363 Pac. (2d) 777 (1961).

<sup>26</sup> *Rocky Ford Irr. Co. v. Kents Lake Res. Co.*, 104 Utah 202, 207-208, 135 Pac. (2d) 108 (1943).

<sup>27</sup> *Promontory Ranch Co. v. Argile*, 28 Utah 398, 407-408, 79 Pac. 47 (1904).

that it was at any time the intention of the appropriator to abandon use of the water for irrigation, failed to support an assertion of abandonment in this early case.

Intent is an essential element of abandonment. "Once water rights are established, the burden is upon the person claiming abandonment to demonstrate that the water user has in fact intentionally abandoned the water," which burden in this case was not met.<sup>28</sup>

#### **Statutory forfeiture and abandonment distinguished**

In a decision rendered in 1937, the Utah Supreme Court stated with clarity the fundamental distinctions between these methods of losing appropriative rights, thus:<sup>29</sup> Abandonment is not based upon a time element; mere nonuser will not establish abandonment for any less time than the statutory period. The controlling element in abandonment is a matter of intent. The word "abandon" has been held to mean "to desert or forsake." There can be no abandonment of a water right unless there is a concurrence of the acts of the party with his intent to desert, forsake, or abandon the right. On the contrary, a forfeiture for nonuser throughout the statutory time period may occur despite a specific intent not to surrender the right. Forfeiture is based, not on an act done or an intent had, but upon a failure to use the right for the statutory time.

Only a few years later, the Utah court stated that abandonment of a water right requires concurrence of intent to abandon and actual failure in its use for the

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<sup>28</sup> *Dalton v. Wadley*, 11 Utah (2d) 84, 88, 355 Pac. (2d) 69 (1960). Abandonment required proof of an intent to abandon the water right: *Kirk v. Criddle*, 12 Utah (2d) 112, 115, 363 Pac. (2d) 777 (1961); *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 468, 137 Pac. (2d) 634 (1943).

<sup>29</sup> *Hammond v. Johnson*, 94 Utah 20, 31, 66 Pac. (2d) 894 (1937). See *Deseret Live Stock Co. v. Hooppiana*, 66 Utah 25, 32-33, 239 Pac. 479 (1925).

statutory period, citing an Oregon case.<sup>30</sup> It is true that use by the Utah legislature of the words "abandon or cease to use water for a period of five years" tends to confuse the distinctions between abandonment and statutory forfeiture so well pointed up in *Hammond v. Johnson, supra*, and in Kinney's treatise in 1912;<sup>31</sup> and its purpose is less clear than that of the present Oregon statutory principle that failure to use appropriated water for 5 years is *conclusively presumed to be an abandonment* of the right.<sup>32</sup>

However, it is clear from subsequent decisions that the deviation in the *Tanner* case did not disturb the theretofore sound Utah judicial concept. In rejecting defenses that there had been both statutory forfeiture and abandonment, the supreme court said in 1943 that "Abandonment is a separate and distinct concept from that of forfeiture" and quoted the pertinent observations to that effect in the *Hammond* case.<sup>33</sup> And the court says, in a very recent opinion, that: "Although the statute uses the term 'abandon or cease to use water for a period of five years,' we have recognized that abandonment is a separate and distinct concept from that of forfeiture in that an abandonment requires a definite intent to relinquish the right to use and ownership of such water right and does not require any particular period of time, but the forfeiture herein provided for requires that the appropriator cease to use the water for a period of five years before it is complete."<sup>34</sup>

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<sup>30</sup> *Tanner v. Provo Res. Co.*, 99 Utah 139, 152, 98 Pac. (2d) 695 (1940); citing *Broughton v. Stricklin*, 146 Ore. 259, 277, 28 Pac. (2d) 219 (1933), 30 Pac. (2d) 332 (1934).

<sup>31</sup> Kinney, C. S., "A Treatise on the Law of Irrigation and Water Rights," 2d ed., vol. 2, § 1118 (1912).

<sup>32</sup> Ore. Rev. Stat. § 540.610 (1955).

<sup>33</sup> *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 467-468, 137 Pac. (2d) 634 (1943).

<sup>34</sup> *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 4, 361 Pac. (2d) 407 (1961). See also *Kirk v. Criddle*, 12 Utah (2d) 112, 114-115, 363 Pac. (2d) 777 (1961).

## THE UTAH LAW OF WATER RIGHTS

### Adverse possession and use

"Proof of water right by adverse use is ~~difficult~~." <sup>35</sup>

Title to a water right by adverse user could ~~become~~ fixed only after continuous, uninterrupted, hostile, ~~notorious~~ adverse enjoyment for the statutory period of 7 years; ~~and~~ to have been adverse, it must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the prior right. The presumption is against acquisition of such a right; therefore, the burden of proof of all facts necessary to establish his claim is on the party who asserts adverse use.<sup>36</sup>

In the *Wellsville* case, *supra* (at 104 Utah 463-466), the supreme court reviewed the authorities and drew conclusions as to what constitutes a legally effective interruption of adverse possession sufficient to prevent acquisition of title by adverse user. It is almost universally held, the court stated further (at 104 Utah 482), that adverse user will not "run upstream."

### Adverse possession in relation to forfeiture and abandonment

In a very recent case the Utah Supreme Court pointed out that the concepts of both abandonment and of forfeiture of water rights differ from that of loss of an appropriator's water right to another by prescription or adverse user. Loss of a water right to the holder by either abandonment or statutory forfeiture results in a termination of the right, the water thereby represented becoming again unappropriated public water; it does not contemplate transfer of the right from one person to another. But the loss of a right to use water by prescription or adverse user

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<sup>35</sup> *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 5, 361 Pac. (2d) 407 (1961).

<sup>36</sup> *In re Use of Water Within Drainage Area of Green River*, 12 Utah (2d) 102, 106, 363 Pac. (2d) 199 (1961); *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 456-457, 462, 482, 137 Pac. (2d) 634 (1943). Various aspects of prescription in relation to water rights are discussed in *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 361 Pac. (2d) 407 (1961).

does not result in its termination; it is in effect a passing of such ~~water~~ right from the original appropriator to the adverse user. Such transfer requires adverse use with the original owner's acquiescence.<sup>37</sup>

In the *Wellsville* case, *supra*, the Utah Supreme Court, among other things, (1) stated that it is well settled that at least prior to 1903, when the exclusive statutory method of appropriating water was adopted, title to a water right could be acquired by adverse user; and (2) concluded that between 1903 and 1939 title could be acquired by adverse possession. "Implicit in this holding is the holding that adverse use will not work a statutory forfeiture." In other words, the forfeiture statutes prior to 1939 did not apply to a case in which the failure to use water was the result of an unlawful diversion by another; hence title could then be acquired by adverse user.<sup>38</sup> Previously, the supreme court had held that adverse possession is not founded upon the doctrines of abandonment or forfeiture for nonuse of water rights, and that notwithstanding the appropriation statute, as between private claimants, water rights in Utah could be acquired by adverse possession and user.<sup>39</sup>

In the late 1930's the relationship of abandonment and forfeiture to adverse use in connection with acquirement of title to water rights were in a state of considerable uncertainty.<sup>40</sup>

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<sup>37</sup> *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 4-5, 361 Pac. (2d) 407 (1961).

<sup>38</sup> *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 462, 137 Pac. (2d) 634 (1943).

<sup>39</sup> *Hammond v. Johnson*, 94 Utah 20, 33, 66 Pac. (2d) 894 (1937).

<sup>40</sup> See *Clark v. North Cottonwood Irr. & Water Co.*, 79 Utah 425, 437, 11 Pac. (2d) 300 (1932). *Hammond v. Johnson*, 94 Utah 20, 28-33, 66 Pac. (2d) 894 (1937); 94 Utah 35, 39-40, 75 Pac. (2d) 164 (1938). *Adams v. Portage Irr., Res. & Power Co.*, 95 Utah 1, 11-16, 72 Pac. (2d) 648 (1937); 95 Utah 20, 21, 81 Pac. (2d) 368 (1938).

In 1939 the Utah legislature took action by so amending the water appropriation statute as to prevent the acquisition of a right to the use of water already appropriated by another, solely by adverse use.<sup>41</sup> To this end, the statutory forfeiture section now includes the following: "The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right." (§ 73-1-4.) And the general statement of the exclusive manner of acquiring water rights ends with this declaration: "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession." (§ 73-3-1.) In the opinions in a number of recent cases, the Utah Supreme Court has noted that since this enactment, it is no longer possible to acquire a right to use of water in Utah by adverse possession and use.<sup>42</sup>

### Estoppel

Water rights may be lost by appropriators who, by their inequitable conduct, by acts and declarations, lead others to make use of their water rights on the assumption that such use would be legal.<sup>43</sup> In the *Wellsville Co.* decision the Utah Supreme Court considered the requirements of estoppel and held that the facts necessary to constitute estoppel did not exist in the case. In other cases also the supreme court considered the subject of estoppel in relation to water rights and held either (1) that certain

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<sup>41</sup> Utah Laws 1939, ch. 111.

<sup>42</sup> See *Smith v. Sanders*, 112 Utah 517, 520-521, 189 Pac. (2d) 701 (1948); *Jackson v. Spanish Fork West Field Irr. Co.*, 119 Utah 19, 31, 223 Pac. (2d) 827 (1950); *Mitchell v. Spanish Fork West Field Irr. Co.*, 1 Utah (2d) 313, 317, 265 Pac. (2d) 1016 (1954); *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 5-6, 361 Pac. (2d) 407 (1961); *In re Use of Water Within Drainage Area of Green River*, 12 Utah (2d) 102, 105-106, 363 Pac. (2d) 199 (1961).

<sup>43</sup> *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 472-473, 137 Pac. (2d) 634 (1943).

# A Primer of Utah Water Law: Part I

Robert W. Swenson\*

*Author's Note:* You may ask: Why another summary of Utah water law? It is true that there are several.<sup>1</sup> Some were written as long as twenty years ago. Others, because of space limitations, were forced to omit areas which I believe should be covered. Yet in final analysis, the real justification may be that I ~~wanted to have my~~ "say." Law students and lawyers who have not had an opportunity to take a course in water law may wish to acquire some familiarity with the field. This article is dedicated to them—rather than to the "experts" listed in the Yellow Pages.

In the last decade there has been a scramble in Utah to obtain water for the generation of electrical energy, for the protection of our environment, and for the consumer of the future. In the energy field alone, there is some indication that anticipated production of electricity will far exceed the future demands of Utah consumers.<sup>2</sup> And one can scarcely pick up a newspaper which does not describe the bickering over the Central Utah Project.<sup>3</sup> Perhaps, at long last, we will have to reappraise our system of allocating water resources.<sup>4</sup> Before final decisions can be made on what is the most economical and fair way to distribute this priceless resource,<sup>5</sup> we must take ac-

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<sup>1</sup> 1 BRIGHAM YOUNG UNIVERSITY LEGAL STUDIES, SUMMARY OF REAL PROPERTY LAW 617-36 (1978); ~~W. H. HUTCHINS, A SUMMARY DIGEST OF STATE WATER LAWS 515-84 (1978);~~ W. HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES 535-70 (completed by H. Ellis & J.P. DeBraal 1971); W. HUTCHINS, THE UTAH LAW OF WATER RIGHTS (1965).

<sup>2</sup> Psarras, *Utah PSC Finally Coming to Grips with the State's Power Glut*, Salt Lake Tribune, Feb. 5, 1984, at 2B, col. 1. An enormous amount of water will be required for the Intermountain Power Project near Delta, Utah. A water right for an acre foot of water normally sold for about \$200 in that area. The power project has been paying about \$1750 per acre foot, and one farmer who had been irrigating marginal agricultural land sold his water rights for three million dollars. Omang, *S. Utah Beginning to Feel Energy Invasion*, Salt Lake Tribune, Jan. 5, 1981, at 10B, col. 1.

<sup>3</sup> The Central Utah Project is a massive federally-funded water project that will divert water from the Colorado River to the arid Salt Lake basin.

<sup>4</sup> Some new ideas from an economist will be found in Anderson, *Water Needn't Be a Fighting Word*, Wall St. J., Sept. 30, 1983, p. 28. Mr. Anderson's forthcoming book is entitled WATER RIGHTS: SCARCE RESOURCE ALLOCATION, BUREAUCRACY AND THE ENVIRONMENT.

<sup>5</sup> Difficult decisions on rationing water are being discussed in Arizona. See Peterson, *Arizona Aims to Cut Per Capita Water Use in Half*, N.Y. Times, Jan. 30, 1984, at A8 col. 2.



profit. The venture was terminated, and the parties orally agreed on a division of the property. The agreement gave the defendant a tract of land called "Reary Place," and a contract for the sale of that land to the defendant was executed. The litigation resulted from a dispute over whether it was intended that the defendant should also receive 424 shares of stock in a water company. The shares were purchased at the time Reary Place was bought, and except for one year after the present controversy arose, the water represented by those shares had been used on that land since the 1930's. The plaintiff relied on the language in *Hatch*, quoted above. Justice Oaks declared that the statutory presumption had been rebutted and that the water right was, in fact, appurtenant, as shown by the following evidence: (1) The water had been used on the land for over 40 years; (2) The land had comparatively little value without the water; and (3) Most important, the real estate contract prepared by the plaintiff provided that he would deposit a "water certificate" along with a deed and a bill of sale.<sup>138</sup> The buyer, the defendant, was also required to pay water assessments. The jury apparently believed that the water certificate referred to the very water stock which precipitated the lawsuit. The decision is correct. The court, however, did not overrule *Hatch*, and it is not entirely clear what is left of the *Hatch* decision.

The second 1983 decision is *Roundy v. Coombs*,<sup>139</sup> in which the court found absolutely no evidence to rebut the presumption and therefore refused to reform a deed which was silent on the status of the water stock. There was evidence that some of the water had been used occasionally on the grantee's land for a number of years. Other evidence rather clearly indicated that the water was used with the consent of the grantor only and that the value of the grantee's land did not in any way depend on the water since the grantee always had water available from another source.<sup>140</sup>

Where the appropriative right represented by stock is not appurtenant to particular land, there is some question as to how the water right may be transferred. The Utah statute is worded so that water stock is made an exception to the general rule that water rights are transferable in the same manner as real estate. The exception, however, only deals with whether the water stock is appurtenant. Non-appurtenant water stock, therefore, is probably transferable by an ordinary deed. Whether the water right could be transferred by simply

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<sup>138</sup> *Id.* at 257.

<sup>139</sup> 668 P.2d 550 (Utah 1983).

<sup>140</sup> *Id.* at 551-52.

endorsing the stock certificate is not clear. Utah repealed the Uniform Stock Transfer Act that would have provided the solution to the problem.<sup>141</sup> If the irrigation company is incorporated under the nonprofit corporation statute,<sup>142</sup> as is usually the case, there does not seem to be anything in that statute which relates to transferring the stock.

#### IV. LOSS OF WATER RIGHTS

Not long ago, a local newspaper carried the headline, "When it comes to water, Utahns must use or lose it."<sup>143</sup> The story quoted the present state engineer as announcing that he is in the process of streamlining procedures for determining whether appropriators in various parts of the state are in fact using all of the water they are entitled to under their permits. The effort is commendable, and the story points up the necessity of examining the various ways in which appropriative rights may be lost or diminished in scope.

##### A. *Adverse User*

In 1937, the Utah Supreme Court held that the concept of acquiring title by adverse possession should apply to appropriative water rights.<sup>144</sup> Adverse possession, the court said, has been a salutary principle of the law of property since the days of Attila the Hun,<sup>145</sup> suggesting that the policy behind the rule is to reward those who take possession of land by force or violence. Other explanations are more appropriate.<sup>146</sup> The court should have used the term "adverse use" because, as the dissent pointed out, it is inconceivable that one could possess running water in a stream.<sup>147</sup> The court also used the seven-year statutory period for acquiring title to land by adverse possession<sup>148</sup> rather than the twenty-year period which the court has always

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<sup>141</sup> The Uniform Stock Transfer Act's enactment is recorded at 1927 Utah Laws, ch. 55, §§1-17, 20-23; amended at 1955 Utah Laws, ch. 24, §1; and repealed at 1965 Utah Laws ch. 154, §10-102.

<sup>142</sup> UTAH CODE ANN. §§ 16-6-18 to -53 (1973). Section 16-6-42 provides that the corporation may issue stock "evidencing . . . interests in water or other property rights."

<sup>143</sup> Salt Lake Deseret News, July 9, 1982, at A9.

<sup>144</sup> *Hammond v. Johnson*, 94 Utah 20, 66 P.2d 894, 900-01 (1938), *reh'g denied*, 94 Utah 35, 75 P.2d 164 (1938).

<sup>145</sup> 66 P.2d at 900.

<sup>146</sup> See 7 R. POWELL, *REAL PROPERTY* § 1012 (P. Rohan ed. 1982).

<sup>147</sup> *Hammond*, 75 P.2d at 167 (Wolfe, J., dissenting).

<sup>148</sup> UTAH CODE ANN. §§ 78-12-5, -7, and -12 (1977). The requirement that an adverse possessor pay real property taxes was not applied to water rights acquired by adverse use. *Jackson v. Spanish Fork West Field Irrigation Co.*, 119 Utah 19, 223 P.2d 827, 833 (1950) (Wolfe, J., concurring).

applied to prescriptive easements.<sup>149</sup> Faced with the 1903 legislation which provides that the permit system is the exclusive method of acquiring a water right in Utah, the court confined the adverse user concept to water which had been previously appropriated, *i.e.*, it can apply only where a junior appropriator upstream is using water already validly appropriated by a senior appropriator.

At the time of the decision, the period of the forfeiture statute<sup>150</sup> was apparently only five years. The court seemed to regard the forfeiture statute as suspended during the period of adverse use. That is difficult to accept. Under the wording of the forfeiture statute, the senior appropriator's right should be regarded as automatically terminating at the end of the five-year period and reverting at that time to the state. The period of adverse use would then, it would seem, commence to run anew against the state.<sup>151</sup>

The court was also faced with the question whether the senior water user's right could be regarded as having been abandoned and therefore also reverting to the state. That problem was avoided by a finding that the senior appropriator had continuously protested the adverse use, so that there was no intention on his part to abandon the water right. Interestingly, the state moved to intervene in the case, apparently for the purpose of litigating its claim of ownership in the event of an actual abandonment. The state was assured that because it was not a party to the suit, it was in no way bound by the judgment.

The ruling was overturned by statute in 1939, and since that date "no right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."<sup>152</sup> The supreme court declared that the statute was not retroactive,<sup>153</sup> and later indicated that adverse use which had commenced prior to 1939 could ripen into title after the effective date of the act.<sup>154</sup> Thus, some appropriative rights in Utah do have their origin in adverse use and

<sup>149</sup> *Pitts v. Roberts*, 562 P.2d 231 (Utah 1977); *Richards v. Pines Ranch, Inc.*, 559 P.2d 948 (Utah 1977); *Zollinger v. Frank*, 110 Utah 514, 175 P.2d 714 (1946).

<sup>150</sup> For a discussion of forfeiture, see *infra* text accompanying notes 120 to 133.

<sup>151</sup> The problem was debated in *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634, 638-42 (1943), *reh'g denied*, 104 Utah 498, 143 P.2d 278 (1943).

<sup>152</sup> 1939 Utah Laws, ch. 111, §1. The section also provides: "The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right."

<sup>153</sup> *Mitchell v. Spanish Fork West Field Irrigation Co.*, 1 Utah 2d 313, 265 P.2d 1016, 1019 (1954).

<sup>154</sup> *Wellsville East Field Irrigation*, 137 P.2d at 640.

accordingly may not appear of record.

It should be noted that the 1939 statute added security and consistency to the recordation and use of paper titles.<sup>155</sup> Prescription is often difficult to prove.<sup>156</sup> It is anomalous that while a water right could be acquired before 1939 by seven-years' adverse use, twenty-years' adverse use was required to obtain a prescriptive easement for an irrigation ditch.<sup>157</sup>

### B. *Abandonment and Forfeiture*

Under Utah's present statute,<sup>158</sup> appropriative rights may be lost either by abandonment or by nonuse for a five-year period. Although the statute is somewhat ambiguous, abandonment has always been treated in Utah as a concept quite separate from statutory forfeiture for nonuse.<sup>159</sup> Abandonment requires both the element of intent to give up ownership and nonuse (but for no specific time). Over the years, it is quite apparent that the Utah Supreme Court has been reluctant to find an abandonment for the obvious reason that appropriative rights are extremely valuable.<sup>160</sup>

On the other hand, to show a forfeiture through five continuous years of nonuse, it is immaterial whether the appropriator intended to give up his water right. After the expiration of the period, the water right ceases to exist and the water reverts to the public. The term "revert" signifies an automatic termination<sup>161</sup> (as in the case of a fee simple determinable) as distinguished from a forfeiture at the option of some other appropriator or the state engineer (as in a fee simple subject to a condition subsequent). The appropriator may, within the five-year period, file with the state engineer an application for an extension of time, not to exceed five years, within which to

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<sup>155</sup> There are difficulties, however, in holding appropriators to their paper titles. See Stone, *Montana Water Rights—A New Opportunity*, 34 MONT. L. REV. 57, 59-69 (1973).

<sup>156</sup> *In re Use of Water Within Drainage Area of Green River*, 12 Utah 2d 102, 363 P.2d 199 (1961); *In re Drainage Area of Bear River in Rich County*, 12 Utah 2d 1, 361 P.2d 407 (1961); *Clark v. North Cottonwood Irrigation & Water Co.*, 79 Utah 425, 11 P.2d 300 (1932).

<sup>157</sup> *Hull v. Goodman*, 4 Utah 2d 162, 290 P.2d 245 (1955). These prescriptive easements may be lost by abandonment. *Harmon v. Rasmussen*, 13 Utah 2d 422, 375 P.2d 762 (1962).

<sup>158</sup> UTAH CODE ANN. § 73-1-4 (1980).

<sup>159</sup> This is stated in many cases. See *Torsak v. Rukavina*, 67 Utah 166, 246 P. 367 (1926); *Gill v. Malan*, 29 Utah 431, 82 P. 471 (1905); *Promontory Ranch Co. v. Argile*, 28 Utah 398, 79 P. 47 (1904). In addition, the 1897 statute provides that "questions of abandonment shall be questions of fact, and shall be determined as are other questions of fact." 1897 Utah Laws, ch. 52, §2 at 219.

<sup>160</sup> See, e.g., *Dalton v. Wadley*, 11 Utah 2d 84, 355 P.2d 69 (1960).

<sup>161</sup> *Baugh v. Criddle*, 19 Utah 2d 361, 431 P.2d 790 (1967). For a discussion of *Baugh*, see text accompanying note 163.

# WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES

By

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Completed by

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## Volume II

Miscellaneous Publication No. 1206  
Natural Resource Economics Division  
Economic Research Service  
United States Department of Agriculture

whatsoever, but any such right to appropriate any of such water shall be initiated by first making application to the state engineer for a permit to appropriate the same as provided in this chapter and not otherwise.<sup>782</sup>

(4) Utah. In the late 1930's, the relationships of abandonment and forfeiture to adverse use in connection with title to Utah water rights were in a state of considerable uncertainty.<sup>783</sup>

In 1939, the Utah Legislature took action by so amending the water appropriation statute as to prevent the acquisition of a right to the use of water already appropriated by another, solely by adverse use. To this end, the general statement of the exclusive method of appropriating water by first making application to the State Engineer in the manner provided in the statute, and not otherwise, ends with the declaration, "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."<sup>784</sup> In addition, the statutory forfeiture section includes the following sentence: "The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right."<sup>785</sup>

In the opinions in a number of subsequent cases, the Utah Supreme Court has noted that since this enactment, it is no longer possible to acquire a right to use of water in Utah by adverse possession and use.<sup>786</sup>

However, after the 1939 legislation was enacted, a period of uncertainty ensued as to whether title by adverse possession could have been acquired between 1903 and 1939. Prior to 1903, when the legislature provided for an exclusive method of appropriating water, the Utah law was well settled that title could be acquired by adverse use. What, then was the situation between

<sup>782</sup>In a 1961 case, the Franktown Creek Irrigation Company contended that it had acquired a prescriptive water right before the enactment of this statute in 1949. In this regard, the Nevada Supreme Court said *inter alia* that "To establish a right by prescription in Franktown [Irrigation Company] before 1949 to the use of water claimed by the predecessor of Marlette, the use and enjoyment must have been uninterrupted, adverse, under a claim of right, and with the knowledge of such predecessor." *Franktown Creek Irr. Co. v. Marlette Lake Co.*, 77 Nev. 348, 364 Pac. (2d) 1069, 1071 (1961).

<sup>783</sup>*Clark v. North Cottonwood Irr. & Water Co.*, 79 Utah 425, 437, 11 Pac. (2d) 300 (1932); *Hammond v. Johnson*, 94 Utah 20, 28-33, 35, 39-40, 66 Pac. (2d) 894 (1937), 75 Pac. (2d) 164 (1938); *Adams v. Portage Irr., Res. & Power Co.*, 95 Utah 1, 11-16, 20, 21, 72 Pac. (2d) 648 (1937), 81 Pac. (2d) 368 (1938).

<sup>784</sup>Utah Laws 1939, ch. 111, Code Ann. § 73-3-1 (1968).

<sup>785</sup>*Id.* § 73-1-4.

<sup>786</sup>*Smith v. Sanders*, 112 Utah 517, 520-521, 189 Pac. (2d) 701 (1948); *Jackson v. Spanish Fork West Field Irr. Co.*, 119 Utah 19, 31, 223 Pac. (2d) 827 (1950); *Mitchell v. Spanish Fork West Field Irr. Co.*, 1 Utah (2d) 313, 317, 265 Pac. (2d) 1016 (1954); *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 5-6, 361 Pac. (2d) 407 (1961); *In re Use of Water Within Drainage Area of Green River*, 12 Utah (2d) 102, 105-106, 363 Pac. (2d) 199 (1961).

1903 and 1939? The uncertainty, according to the Utah Supreme Court in the 1943 *Wellsville* case, resulted from litigation in the 1937-1938 *Hammond* and *Adams* cases<sup>787</sup> and the 1903 and subsequent 1939 legislation.<sup>788</sup> So, to settle the question, the Utah court in the *Wellsville* case reverted to the *Hammond* case, in which it was held that the forfeiture statutes prior to 1939 *did not* apply to a situation in which failure to use water was the result of an unlawful diversion by another, and that title could therefore be acquired by adverse use.<sup>789</sup> "We think that this attains a desirable result and conclude that title could between 1903 and 1939 be acquired by adverse possession. *Implicit in this holding is the holding that adverse use will not work a statutory forfeiture.*" [Emphasis added.]<sup>790</sup>

(5) Washington. The Washington statutes provide that "No rights to the use of surface or ground waters of the state affecting either appropriated or unappropriated waters thereof may be acquired by prescription or adverse use."<sup>791</sup>

*Questionings.*—(1) New Mexico. In 1937, the New Mexico Supreme Court, in referring to the testimony introduced in the trial in the lower court, said that the testimony did not prove an abandonment of the water right in question, "nor a prescriptive right (if such a right can be acquired under our law) \* \* \*"<sup>792</sup>

<sup>787</sup>*Hammond v. Johnson*, 94 Utah 20, 66 Pac. (2d) 894 (1937), 75 Pac. (2d) 164 (1938); *Adams v. Portage Irr., Res. & Power Co.*, 95 Utah 1, 72 Pac. (2d) 648 (1937), 81 Pac. (2d) 368 (1938).

<sup>788</sup>*Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 456-457, 462, 137 Pac. (2d) 634 (1943).

<sup>789</sup>In *Hammond v. Johnson*, 94 Utah 20, 33, 66 Pac. (2d) 984 (1937), 75 Pac. (2d) 164 (1938), the court had said *inter alia*: "It will thus be seen, both from the provisions of the statute and from the inherent nature of the terms and situations from which they arise that adverse possession is not founded upon or dependent on the doctrines of abandonment, or forfeiture for nonuser, of water rights. The state is interested in the matter of abandonment of water rights and nonuser thereof, because of the importance of water due to the arid conditions of the state. Abandonment and nonuser of water rights presupposes that such waters are thereby permitted to run to waste, to prevent which the state steps in and permits others, who will put the water to beneficial use, to do so. As long as water which has passed to private hands is put to a beneficial use, the state has no vital interest as to who the user is. That is, as long as the use granted and recognized by the state is exercised, the state has no interest in what may be the name of the person who exercises it. It follows, therefore, that notwithstanding the statute of appropriation, as between private claimants, water rights in Utah can be acquired by adverse user and possession."

<sup>790</sup>With respect to the distinction between prescription and statutory forfeiture, see also the discussion of *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 4-5, 361 Pac. (2d) 407 (1961), under "Prescription Distinguished from Other Methods of Loss," *supra*.

<sup>791</sup>Wash. Rev. Code § 90.14.220 (Supp. 1970).

<sup>792</sup>*Pioneer Irrigating Ditch Co. v. Blashek*, 41 N. Mex. 99, 102, 64 Pac. (2d) 388 (1937).

In *Bounds v. Carner*, 53 N. Mex. 234, 205 Pac. (2d) 216, 223 (1949), in response to the defendants' claim of a prescriptive right based on 10-years' use, the court said:

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(d) Adverse possession and use. Title to a water right by adverse use could become fixed only after continuous, uninterrupted, hostile, notorious, adverse enjoyment for the statutory period of 7 years; and to have been adverse, it must have been asserted under a claim of title, with the knowledge and acquiescence of the owner of the prior right. The presumption is against acquisition of such a right; therefore, the burden of proof of all facts necessary to establish his claim is on the party who asserts adverse use.<sup>165</sup>

In a 1943 case, the Utah Supreme Court, among other things, (1) stated that it is well settled that at least prior to 1903, when the exclusive statutory method of appropriating water was adopted, title to a water right could be acquired by adverse use; and (2) concluded that between 1903 and 1939 title could be acquired by adverse possession.<sup>166</sup>

In the late 1930's the relationships of abandonment and forfeiture to adverse use in connection with acquisition of title to water rights were in a state of considerable uncertainty.<sup>167</sup> In 1939 the Utah Legislature took action by so amending the water appropriation statute as to prevent the acquisition of a right to use water already appropriated by another, solely by adverse use.<sup>168</sup> To this end, the general statement of the exclusive manner of acquiring water rights ends with this declaration: "No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession."<sup>169</sup> The statutory forfeiture section now includes the following

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(Continued)

137 Pac. (2d) 634 (1943). See also *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 4, 361 Pac. (2d) 407 (1961); *In re Escalante Valley Drainage Area*, 12 Utah (2d) 112, 114-115, 363 Pac. (2d) 777 (1961), discussed in chapter 14 at note 354.

<sup>165</sup>*In re Use of Water Within Drainage Area of Green River*, 12 Utah (2d) 102, 106, 363 Pac. (2d) 199 (1961); *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 456-457, 462, 482, 137 Pac. (2d) 634 (1943). Various aspects of prescription in relation to water rights are discussed in *In re Drainage Area of Bear River in Rich County*, 12 Utah (2d) 1, 361 Pac. (2d) 407 (1961). In the *Wellsville* case, *supra* 104 Utah at 463-466, the supreme court reviewed the authorities and drew conclusions as to what constitutes a legally effective interruption of adverse possession sufficient to prevent acquisition of title by adverse use. It is almost universally held, the court stated further, that adverse use will not "run upstream." 104 Utah at 482.

<sup>166</sup>*Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 462, 137 Pac. (2d) 634 (1943).

<sup>167</sup>See *Clark v. North Cottonwood Irr. & Water Co.*, 79 Utah 425, 437, 11 Pac. (2d) 300 (1932); *Hammond v. Johnson*, 94 Utah 20, 28-33, 66 Pac. (2d) 894 (1937), 94 Utah 35, 39-40, 75 Pac. (2d) 164 (1938); *Adams v. Portage Irr., Res. & Power Co.*, 95 Utah 1, 11-16, 72 Pac. (2d) 648 (1937), 95 Utah 20, 21, 81 Pac. (2d) 368 (1938).

Regarding clarification of this matter in the 1943 *Wellsville* case, which is discussed immediately above, see the discussion in chapter 14 at notes 787-790. And see the discussion in chapter 14 at note 364 of *In re Area of Bear River in Rich County*, 12 Utah (2d) 1, 4-5, 361 Pac. (2d) 407 (1961).

<sup>168</sup>Utah Laws 1939, ch. 111.

<sup>169</sup>Utah Code Ann. § 73-3-1 (1968).

sentence: "The provisions of this section are applicable whether such unused or abandoned water is permitted to run to waste or is used by others without right."<sup>170</sup> In the opinions in a number of subsequent cases, the Utah Supreme Court has noted that since this enactment, it is no longer possible to acquire a right to use water in Utah by adverse possession and use.<sup>171</sup>

(e) Estoppel. The exercise of water rights by appropriators may be estopped by their inequitable conduct, by acts and declarations, which lead others to make use of their water rights on the assumption that such use would be legal.<sup>172</sup>

(10) Rights-of-way. The statute providing for appropriation of water declares that the use of water for beneficial purposes, as provided in the legislation, is a public use.<sup>173</sup> It also provides that any person may have a right-of-way across public, private, and corporate lands for necessary reservoirs, dams, diversion and distribution works for domestic, culinary, industrial, and irrigation purposes, or for any necessary public use, or for drainage, upon payment of just compensation therefor.<sup>174</sup> And any person may have the right to use, or to enlarge and use, a ditch already constructed, upon payment of proper compensation.<sup>175</sup> Proceedings under the section granting the right to use or enlarge an existing canal are controlled by the principle involved in eminent domain.<sup>176</sup>

#### *Repudiation of the Riparian Water-Use Doctrine*

Although many years elapsed after the first settlement and use of water in Utah before the Territorial supreme court was called upon to recognize and apply the doctrine of appropriation (see the earlier discussion, "Appropriation of Water of Watercourses—Recognition of doctrine of prior appropriation), it was even longer before that court first had occasion to express its repudiation of the doctrine of riparian rights. In an 1891 case, the court said, "Riparian

<sup>170</sup> *Id.* § 73-1-4.

<sup>171</sup> See the cases cited in chapter 14 n. 786.

<sup>172</sup> *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 472-473, 137 Pac. (2d) 634 (1943). But in this case the court held that the facts necessary to constitute estoppel did not exist. In other cases the court considered the subject of estoppel in relation to water rights and held either (1) that certain parties were estopped to assert their claims [see, e.g., *Lehi Irr. Co. v. Moyle*, 4 Utah 327, 342-343, 9 Pac. 867 (1886); *Tanner v. Provo Res. Co.*, 76 Utah 335, 344-346, 289 Pac. 151 (1930); *Tanner v. Provo Res. Co.*, 99 Utah 139, 155-157, 98 Pac. (2d) 695 (1940)], or (2) that certain circumstances negated imputations of estoppel. See *Elliot v. Whitmore*, 23 Utah 342, 354, 65 Pac. 70 (1901). Compare *United States v. District Ct.*, 121 Utah 18, 21-24, 242 Pac. (2d) 774 (1952).

<sup>173</sup> Utah Code Ann. § 73-1-5 (1968).

<sup>174</sup> *Id.* § 73-1-6.

<sup>175</sup> *Id.* § 73-1-7. Regarding the validity of this legislation, see the discussion in chapter 7 at notes 273-279.

<sup>176</sup> *Nielson v. Sandberg*, 105 Utah 93, 96-102, 141 Pac. (2d) 696 (1943); *Peterson v. Sevier Valley Canal Co.*, 107 Utah 45, 50-51, 151 Pac. (2d) 477 (1944).

## **ADDENDUM 7**

***Tyrants, History's 100 Most Evil Despots and Dictators,*  
Nigel Cawthorne, 2005 by Arcturus Publishing Limited,  
2006 edition by Barnes & Noble Publishing Inc.**

# TYRANTS

## HISTORY'S 100 MOST EVIL DESPOTS & DICTATORS

NIGEL CAWTHORNE

**BARNES & NOBLE**  
NEW YORK

# ATTILA THE HUN

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## King of the Huns

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The aggressive and ambitious chieftain of the nomadic Huns was known in his own time as 'the scourge of God' for his savagery and himself said: 'Where I have passed, the grass will not grow again'.

Little is known of his early life, but in 434 he and his brother Bleda inherited an empire that stretched from the Alps to the Baltic from their uncle Ruga, who already had a treaty with Rome. Attila and Bleda renewed the treaty, in the process upping the tribute Rome had to pay for peace to 700 pounds of gold a year.

The Huns turned their attention east, expanding their conquests into Scythia, Media and Persia. But when in 439 the eastern emperor failed to pay his tribute Attila attacked, razing Singidunum – Belgrade – and other Balkan cities. A truce allowed the Romans to regroup, but in 443 Attila went on to destroy Naissus (Nis in Serbia) and Serdica (Sofia in Bulgaria). The attack on Naissus so devastated the place that, when Roman ambassadors passed through to meet with Attila eight years later, they said that the stench of death was still so great that no one could enter the city. They had to camp outside on the river, where they found the banks covered with human bones.

The Huns reached the walls of Constantinople and defeated the Romans in the east. Emperor Theodosius II was forced to pay the arrears of 6,000 pounds of gold, plus a

tribute of 2,100 pounds a year from then on.

In 445 Attila assassinated his brother and made himself sole leader. He devastated the Balkans again in 447. As it would have been fruitless to try and besiege Constantinople with mounted archers, he drove southwards into Greece, only to be stopped at Thermopylae. One chronicler said: 'There was so much killing and bloodletting that no one could number the dead. The Huns pillaged the churches and monasteries, and slew the monks and virgins... They so devastated Thrace that it will never rise again.'

A new treaty was concluded with the Eastern Empire in 449, ceding territory to the Huns. Then Attila turned his attention to the Western Empire. His excuse for breaking their treaty was that Honoria, the sister of the Emperor Valentinian, had sent him a ring. She had been having an affair with her steward, who had been executed. Pregnant, she begged the King of the Huns to rescue her. But he pretended that the ring was an offer of marriage and asked for half of the Western Empire as a dowry.

In the spring of 451, Attila forged an alliance with the Franks and Vandals and unleashed an attack on the heart of western Europe. In April he took Metz with an army of

RIGHT Attila turns from the invasion of Rome as heavenly figures appear in support of the besieged Pope Leo

between 300,000 and 700,000. Rheims, Mainz, Strasbourg, Cologne, Worms and Trier were destroyed. He was besieging Orleans, when a Roman army under Flavius Aetius, supported by forces under the Visigothic king Theodoric I, arrived. In the bloody battle of Catalaunian, Theodoric was killed, but Flavius dealt Attila his one and only defeat.

Instead of retreating, he gathered his forces and invaded Italy the following year, sacking Aquilean, Milan, Padua, Verona, Brescia and Bergamo. The survivors fled to a group of defensible islands in the Adriatic and founded Venice. It is said that Attila turned back before the gates of Rome because he was so impressed by the holiness of Pope Leo I, who came out of the city to parley. In fact, there was disease and famine in the area at the time and he may have feared the return of the Roman legions who had been fighting abroad.

With their booty the Huns turned back to the north. Along the way the 47-year-old Attila took a new wife, named Ildico. After drinking heavily on his wedding day, he went to bed

with his young bride. The next morning, he was found dead, drowned in the blood from a nosebleed.

## Life and Crimes

c. 406 *Born.*

434 *Becomes joint king of the Huns with brother Bleda.*

439 *Attacks Eastern Roman Empire.*

443 *Destroys Belgrade, Nis and Sofia; takes Philippolis; destroys Roman forces in the east.*

445 *Murders his brother.*

447 *Attacks Eastern Empire again.*

449 *Secures treaty with Constantinople.*

451 *Invades Gaul; defeated by Flavius Aetius in battle of the Catalaunian Plains.*

452 *Invades Italy; sacks northern cities.*

453 *Dies in his sleep on his wedding night.*

## **ADDENDUM 8**

***A History of Piute County*, Linda King Newell,  
Utah State Historical Society 1999.**

***Grass Valley History*  
Grass Valley History Committee**

***State of Utah v. Charles E. Burr*  
Criminal No. 3636  
State of Utah**

***State of Utah v. W.A. Lipsey*  
Criminal No. 3746  
Sixth Judicial District Court for Sevier County, State of Utah**

A HISTORY OF \_\_\_\_\_

*Piute  
County*

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Linda King Newell

1999

Utah State Historical Society  
Piute County Commission



of his rams to high ground. H. Ellis Bay, manager of the Bay Flour Mills, had his home cut off from roads by the high water. The family tried to get out by horseback but turned back when the animals began to flounder in the deep water.<sup>2</sup>

As the county cleaned up the flood damage, an incident eight miles south of Marysville became a focal point of county attention in the summer of 1941. There had been a long standing quarrel between the families of Walter Nielsen and Clarence Howes, whose farms were adjacent to one another. The feud began seven years earlier in the midst of drought years when the eldest sons in both families had quarreled over water. On the morning of 21 June 1941, near the mouth of Dry Creek on the east side of the Sevier River, Clarence Howes and his nineteen-year-old son Chad turned water down one of the Nielsen's ditches in an attempt to get it to his own property. When Walter Nielsen started for his fields he noticed the water and returned to his house for a shovel to turn the water. His wife Sarah (who was a sister of Clarence Howes) and daughter Helen climbed into the wagon with him. As the Niensens approached the ditch, the men exchanged angry words. Nielsen claimed his brother-in-law and son began throwing rocks at them, hitting him several times and knocking him to the bottom of the wagon. He had left a pistol in the wagon on bed after an outing the day before with a friend. Walter Nielsen later testified that he grabbed the gun and fired it twice in the chest, then a rock hit him in the arm, causing the gun to fire again. When he saw Chad Howes lying on the ground, he said he realized he had shot the boy. The bullet entered Chad's back just below his left arm, hitting several vital organs.

Clarence claimed that he and Chad had not thrown rocks before the shooting, and that he only had hurled one at Walter, hitting him after Chad had been shot. He placed a handkerchief on his shoulder wound before going for help. Helen and Sarah Nielsen helped Walter lift Chad into the wagon. Walter drove the team as far as their home where he said he stayed because of his own wound from the rock which would later be treated by a Richfield doctor. Helen Nielsen drove the wagon carrying the injured youth on toward Marysville. Clarence Howes met the wagon with a car and drove his son the rest of the way into town. Dr. Kirt Jenkins performed emergency surgery.

and then transported the youth to the Richfield hospital. Chad Howes died that afternoon.<sup>3</sup>

Walter Nielsen was charged with first-degree murder. His trial took place in the Junction courthouse that November. Judge Michael Bronson of the Third District Court conducted the trial because local Sixth District Judge John Seavy knew the parties involved and was excused from the case. Prosecuting attorney Calvin L. Rampton had only been practicing law for two years but was already an assistant attorney general for the state. The wife of the young lawyer, Lucy Beth, gave birth to their first child two days before the trial. Rampton left wife and baby daughter in a Salt Lake City hospital and drove to Junction.

D.A. Skeen and Samuel D. Thurman of Salt Lake City were the lawyers for the defense. The second-floor courtroom had seating capacity for one hundred; however, twice that many spectators crowded in the room for each day of the trial, standing along walls and spilling into the foyer. Rampton recalled that he thought "a jury would be rather difficult to impanel" because feelings ran high in the county on each side of the issue. But by the end of the day a jury of ten men and two women had been sworn in. Rampton later wrote, "I strongly suspect that considerable minor perjury was committed in the courtroom that day because if the 32 men and women . . . actually had no opinion about the case, as they said, they were probably the only 32 adults in Piute County who did not."<sup>4</sup>

During the next five days of the trial, the spectators appeared divided into two camps. Both families shed tears many times during the trial. Rampton remembered: "I soon decided that I was not going to get a first degree verdict and concentrated instead on voluntary manslaughter. . . . Even the fact that Nielsen carried a gun in the field was not evidence of premeditation because farmers often carried guns to shoot muskrats that perforated the irrigation ditches."<sup>5</sup>

Before noon on the fifth day of the trial all the evidence had been presented and witnesses cross-examined. The court recessed until 2:00 P.M. at which time the attorneys would present their final arguments and the judge would instruct the jurors before they went into deliberation. According to Rampton's account,

The courtroom and all the halls surrounding it were packed with spectators as the judge began the reading of his instructions. Suddenly there was a loud boom. The building shook violently and the courtroom floor tipped. This was followed by a moment of silence. There was no panic because everyone was too startled to move. Judge Bronson was the first to recover and ordered those outside in the hall within reach of his voice to go downstairs and outside the building as cautiously but as quickly as possible. The standees in the courtroom were ordered to follow them and then the seated spectators, row by row. In perhaps ten minutes the building was cleared.<sup>6</sup>

A floor beam had collapsed under the weight of the crowd, dropping the floor some two feet on one side. It was obvious that the trial could not continue in the courthouse. After the judge consulted with the attorneys as to how to proceed, the sheriff arranged for the trial to continue in the local LDS ward. After the final arguments by the lawyers for the prosecution and the defense, the jury retired to deliberate. The verdict came early that evening: "Not Guilty by reason of self-defence."

Rampton said he was disappointed at the time in losing the case "but in retrospect, I believe that justice was probably served in light of the mores of western agricultural communities at the time." He drove home to Salt Lake City that same night, and the next morning picked up his wife and new daughter from the hospital. Calvin L. Rampton went on to a distinguished legal career and served as governor of Utah from 1965 to 1976. The Howes family continued to farm near Marysvale. Sensing the antagonism of some of their neighbors, Walter and Sarah Nielsen sold their farm and moved to Oregon.<sup>7</sup>

### *World War II*

One month after the murder trial, on 7 December 1941, Japanese forces bombed Pearl Harbor. America entered World War II the following day. With the Selective Service Act already in place, every man between the ages of eighteen and forty-five was required to register for the draft. W.J. Luke, chairman of the local draft board, decided on eligibility. Those classified as 1-A soon were inducted into military service. The draftees from Piute County boarded a Trailways Bus

# GRASS VALLEY HISTORY

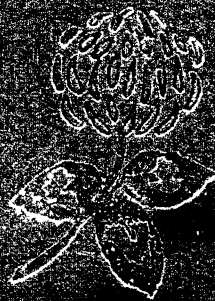
Including the Communities of

FOX CREEK

BURRVILLE

GREENWICH

KOOSHAREM



# GRASS VALLEY HISTORY

Including the Communities of

BOX CREEK

BURRVILLE

GREENWICH

KOOSHAREM



ACKNOWLEDGEMENTS: Grass Valley History Committee:

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Newel and Mildred Nielson  
Burnell and Carrol Sorenson  
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Thank You to ALL who shared information

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## THE BURRVILLE CEMETERY

It is not known when the decision was made to establish the Burrville Cemetery but it is assumed that the people who settled in the area chose the spot located, southwest of town, on the west side of the road that went on down the Valley. Sarah Sloat Burr Diary is the source of information on early deaths and burials.

The first death was a Mr. Bowman. Sarah recorded that she went to Mrs. Bowman's on the 20 April 1877. On the 21<sup>st</sup>, her entry was, "Cold stormy time. A few minutes to eight Mr. Bowman died, I came home." The next day she said, "Went to bury him but did not, it snowed." On the 23<sup>rd</sup> her entry was simply, "Went to Kosharum to bury Bowman." The next mentioned death was on the 16 February 1878, "Will Mclean (McClellan) went to Payson to bury the baby." Then on the 11<sup>th</sup> of August she wrote, "Went to the funeral to Daniels. Stayed all night." There were two brothers, David and Eugene who lived in the upper valley somewhere near the present day Daniels Canyon. It is not known who died or whether they were buried there or were taken some place else for burial.

The first probable burial in the Burrville Cemetery was a sister Anderson who died on the 3 November 1881 and was buried the next day. On the 12<sup>th</sup> of December Sarah noted, "Orel died at noon." On the 13<sup>th</sup> they buried Orel. Orel was her grandson who was one of the first children born in Burrville and was the three-and-a-half-year-old son of Sarah Jane Burr and George Albert Cloward. The following February her entry on the 14<sup>th</sup> was, "The Doxford boy died on the 15<sup>th</sup>. He Buried." The next death was on the 24 April 1882 when she said, "The Curtis baby died and on the 25<sup>th</sup> I went to the funeral."

Elizabeth Bingham died on the 6<sup>th</sup> of December and on the 7<sup>th</sup>, Sarah helped make her clothes. She was buried. On the 27 March 1883 she went to the funeral of Doxford. And on the 14<sup>th</sup> of August Sarah said, "went to Doxford. The girl (Will's) died. Jane and I made her clothes and went and dressed her. She was buried the next day. In November a Starr boy died and on the 16<sup>th</sup> of December another Starr boy died at 4:00."

There is one Indian buried in the Cemetery and it is probably the one described in the following incident. Friday the 16 November 1883, "The Indians came, got to fussing, Peterson hit Charlie on the head. 17<sup>th</sup>, he laid and slept till he died. 18<sup>th</sup>, in the morning he died. Peterson was around all night. They had his funeral on the 19<sup>th</sup>." It is assumed that he was buried in the Burrville Cemetery.

There are approximately 90 graves in the cemetery. Charles Clark and Sarah Sloat Burr, two of the founders of Burrville and at least 30 of their family members are there and at least eight of the Fillmore family who were also among the early settlers.

Two men, Charles Erwin Burr and William Arthur Lipsey, are buried in the cemetery, not 60 feet apart. They were both ranchers who owned property in Plateau. W. A. (Boss) Lipsey was on the north side of the road east of the Koosharem Reservoir and C. E. Burr had the property on the south side of the road below the reservoir dam. They shared the same ditch which brought water from Daniels Canyon to their ranches. They had been neighbors for years but as so often happened they had disagreements over the use of the water. One particular incident ended in a fight in which Mr. Lipsey had an eye put out. Mr. Burr loaded him in his car and with the aid of one of Lipsey's sons took him to the doctor. Erwin Burr soon sold his ranch and some time later Mr. Lipsey moved to Burrville and lived in a home which was located on the same block as Mr. Burr and they were again neighbors. Mr. Lipsey apparently held a grudge against Mr. Burr for on the 23<sup>rd</sup> of March 1943 he hid in the brush by the side of the road just south of the cemetery and when Erwin came, riding his horse from the south, after feeding his

attle down by the Spring Pasture, Mr. Lipsey waited until he rode by and then shot him in the back with his shotgun. Mr. Burr died instantly and was buried several days later in the cemetery. Mr. Lipsey was sent to prison and released several years later because of ill health. He died on the 4<sup>th</sup> of December 1950 and was also buried in the Burrville Cemetery

The latest person to be buried there was Jay Cecil Fillmore, who died 7 November 2003. Mr. Fillmore spent his whole life in Burrville with the exception of nearly five years when he served in World War II with the Army in the war with Germany.



Jay Fillmore Burial

The Burrville Cemetery was located on government land that eventually came under the jurisdiction of the Bureau of Land Management. In the early 1990 the Bureau wanted to get out of the cemetery business and so they sold several locations in Southern Utah including the Burrville site. It included five acres and was bought by Phillip Burr who is the legal custodian. The following chart lists all known persons buried in the Burrville Cemetery



***STATE OF UTAH v. CHARLES E. BURR***

**CRIMINAL NO. 3636**

**Sixth District Court for Sevier County**

**State of Utah**

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH,  
IN AND FOR THE COUNTY OF SEVIER.

STATE OF UTAH,

Plaintiff,

-vs-

CHARLES E. BURR,

Defendant.

INFORMATION

Sevier County  
No 3636-1111  
Marion Dird  
Mary F. Monson

CHARLES E. BURR, having heretofore, to-wit, on the 28th day of August, A.D., 1941, by J.R. Baldridge, Justice of the Peace of Koosharem Precinct, Sevier County, State of Utah, sitting as a committing magistrate, been duly bound over to answer to this charge, is accused by Henry D. Hayes, District Attorney for the Sixth Judicial District of the State of Utah, of the crime of mayhem, and said District Attorney charges that on or about the 7th day of August, 1941, at Burrville Precinct, Sevier County, State of Utah, the said Charles E. Burr unlawfully and maliciously, with his bare hands, dug and put out the left eye of one W.A. Lipsey, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Utah.

Henry D. Hayes  
District Attorney for the Sixth Judicial  
District of the State of Utah.

Preliminary hearing was had on August 28, 1941, at which the witnesses testifying for the State of Utah were W.A. Lipsey and Dr. Rae Noyes.

INSTRUCTION NO: 7

The Court instructs you that in defending himself against an unlawful attack of another a man is justified in resorting to such violence and use of such force as the particular circumstances of the case may require for his protection. But the degree of force to be employed in protecting ones person must be in proportion to the attack made and must depend upon the circumstances in each particular case and the imminence of danger as it appears to him at the time. The only purpose which justifies the employment of force against the assault is to defend ones self, that is the object to be attained; and a man is only justified in using such an amount of force as may appear to him at the time to be necessary to accomplish that purpose. As soon as that object is attained, it is his duty to desist. If he uses a kind of force against his assailant in excess or out of proportion to what may be necessary to his own defense, as it honestly appeared to him at the time, he is himself guilty of an assault. So if from all the evidence in the case, you find that the defendant had attained his object of self defense by reducing the said W. A. Lipsey to a state where further combat or aggression on his part was negligible or nonexistent, and that thereupon the said defendant proceeded to dig out the left eye of the said W. A. Lipsey, providing you believe beyond a reasonable doubt from all of the evidence in the case that he did so dig out the eye of Lipsey, and the digging out of Lipsey 's eye was not necessary to his own defense, you will be justified in finding the defendant guilty of mayhem as charged in the information, unless you find that at the time of the alleged offense the defendant was in such a state of mind as to be unable to form an intent as hereinafter explained.

INSTRUCTION NO. 8

In determining whether the defendant acted maliciously in digging out the eye of said Lipsey, if you shall find such to be the fact, you should take into consideration the state of mind of the defendant at the time and in so doing you may consider whether or not he acted through heat of passion. In this regard you are instructed that the law will not put an injury to another committed upon a sudden impulse and in the heat of passion on the same footing as a deed deliberately performed. The heat of passion which will excuse the defendant for putting out said eye if you find it to be a fact that the defendant did put Lipsey's eye out is such a mental disturbance or anger or fear caused by reasonable and adequate provocation on the part of said Lipsey, as to overcome and suspend the exercise of the judgment of the defendant<sup>and</sup>/to render for the time being the mind of the defendant deaf to the voice of reason, and to make him incapable for the time being of forming and executing that distinct intent to dig out said eye that is necessary to constitute the crime of mayhem.

Foreman

Dated ..... 19....

In the District Court of the Sixth Judicial District, in and

for the County of Sevier, State of Utah

SEVIER COUNTY  
No. 3636 FILED

JUN 6 1942

*Loell Whitbeck* Clerk  
Deputy  
**VERDICT**

STATE OF UTAH

Plaintiff

vs.

CHARLES E. BURR

Defendant

WE THE JURY EMPANALLED IN THE ABOVE ENTITLED CAUSE FIND  
the defendant, Charles E. Burr, not guilty.

*Loell Whitbeck*

Foreman

Dated

*June 6<sup>th</sup>*  
*10:30 PM* 1942

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*PR*

***STATE OF UTAH v. W.A. LIPSEY***

**CRIMINAL NO. 3746**

**Sixth District Court for Sevier County**

**State of Utah**

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Plaintiff,  
-vs-  
W.A. LIPSEY,  
Defendant.

INFORMANT  
*L. L. Lipse*  
*W. A. Lipse*

W.A. LIPSEY, having heretofore, to-wit, on the 8th day of April, 1943, by Henry Baker, Esq., Justice of the Peace of Richfield Precinct, Sevier County, State of Utah, sitting as a committing magistrate, been duly bound over to answer to this charge, is accused by Henry D. Hayes, District Attorney for the Sixth Judicial District of the State of Utah, of the crime of murder, and said District Attorney charges that the said W.A. Lipsey on the 23rd day of March, A.D., 1943, near the town of Burrville, Sevier County, State of Utah, wilfully, feloniously, unlawfully, deliberately, premeditatedly and of his malice aforethought, and with the specific intent to take the life of one Charles E. Burr, made an assault upon the said Charles E. Burr with a certain deadly weapon, to-wit, a 12-gauge shotgun, said gun being loaded with shells containing gun powder and leaden pellets, which the said W.A. Lipsey then and there had and held in his hands; and the said W.A. Lipsey then and there wilfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, and with the specific intent to take the life of the said Charles E. Burr, shot and discharged the said shotgun upon and against the body of the said Charles E. Burr, thus and thereby striking him, the said Charles E. Burr, with certain of said leaden pellets, and inflicting in and upon the body of said Charles E. Burr mortal wounds from which the said Charles E. Burr died near Burrville, Sevier County, Utah, on the said 23rd day of March, 1943; and so the said W.A. Lipsey, in the manner and form aforesaid, and of his malice aforethought, did kill and murder the said Charles E. Burr, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Utah.

STATE OF UTAH

Plaintiff

vs.

LIPSEY

Defendant

## VERDICT

CRIMINAL NO. 3746

WE THE JURY EMPANALLED IN THE ABOVE ENTITLED CAUSE FIND  
defendant guilty of murder in the second degree, as charged  
the information.

Foreman

Richfield, Utah.

1943

In the District Court of the Sixth Judicial District, in and  
for the County of Sevier, State of Utah

No. 3746 FILED  
JUL 2 1943

STATE OF UTAH

Plaintiff

vs.

W.A. LIPSEY

Defendant

## VERDICT

CRIMINAL NO. 3746

WE THE JURY EMPANALLED IN THE ABOVE ENTITLED CAUSE FIND  
defendant guilty of murder in the first degree, as charged in



STATE OF UTAH

vs.

W.A. LIPSEY

Commitment on Conviction

*J. L. Despain* Clerk  
Deputy

The District Attorney, with the defendant and his counsel came into Court. The defendant was duly informed by the Court of the nature of the charge against him for the crime of Murder in the Second Degree committed on the 23rd day of March A. D. 19<sup>43</sup>, of the information filed against him, his arraignment and plea of "Not Guilty" of his trial and the verdict of the jury, on the 2nd day of July A. D. 19<sup>43</sup> of "Guilty as charged in the information," the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him. To which he replied that he had none. And the defendant having waived time for the pronouncement of sentence; And no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows: That, whereas the said W.A. Lipsey having been duly convicted in this Court of the crime of Murder in the Second Degree

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the said W.A. Lipsey

be punished by imprisonment in the State Prison of the State of Utah for the term of fifteen years.

The defendant was then remanded to the custody of Clarence Smith

Sheriff of Sevier County, State of Utah, to be by him delivered into the custody of the proper officers of said state prison.

WITNESS, the Honorable

John L. Sevy Jr.,

Judge.

Office of the County Clerk of }  
Sevier County, State of Utah. }

I, J.L. Despain, County Clerk of the County of Sevier and State of Utah, and ex-officio Clerk of the District Court of the Sixth Judicial District in and for the County of Sevier and State of Utah, do hereby certify the foregoing to be a true and correct copy of the judgment duly made, entered on the minutes of the said District Court in the above entitled action, and that I have compared the same with the original, that the same is a correct transcript therefrom, and of the whole thereof.

Attest my hand and the seal of the said District Court, this 2nd day of July

A. D. 19<sup>43</sup>.

*J. L. Despain*  
Clerk